

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 222

12.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW
YORK, PETITIONER,

vs.

NELLIE PHINNEY, EXECUTRIX OF GUY C. PHINNEY,
DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 31, 1897.
CERTIORARI AND RETURN FILED MAY 17, 1897.

(16,545.)

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(16,545.)

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OCTOBER TERM, 1897.

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YORK, PETITIONER,

vs.

NELLIE PHINNEY, EXECUTRIX OF GUY C. PHINNEY,
DECEASED.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

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In the Circuit Court of the United States, District of Washington, Northern Division, holding terms at Seattle.

NELLIE PHINNEY, Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

No. — Dept. —
Class —.

Complaint.

Comes now the above-named plaintiff, Nellie Phinney, executrix of the estate of Guy C. Phinney, deceased, and complains of the above-named defendant, the Mutual Life Insurance Company of New York, and for cause of action against said defendant alleges:

I.

That said defendant is a corporation duly organized, acting and existing under and by virtue of the laws of the State of New York, for the purpose of carrying on a life insurance business. Its principal place of business is in the city of New York, State of New York.

II.

That during all the times herein mentioned the plaintiff was and now is a resident, citizen and inhabitant of the State of Washington.

III.

That on or about the 24th day of September, 1890, said defendant, in consideration of the sum of thirty-seven hundred (\$3,700) and seventy dollars to it in hand paid by one Guy C. Phinney, made, executed and delivered in said city and State of New York a certain contract of life insurance hereinafter set forth, whereby it insured the life of said Guy C. Phinney in the sum of one hundred thousand (\$100,000) dollars. That defendant in said contract agreed to pay to the executors, administrators or assigns of said Guy C. Phinney, upon acceptance of satisfactory proof of the death of said Guy C. Phinney, the full sum of one hundred thousand (\$100,000) dollars. That said contract is in words and figures as follows, to-wit:

No. 422,198.

Age, 38 years.

THE MUTUAL LIFE INSURANCE CO.,
of New York.

Amount, \$100,000.

Premium, \$3,770.

In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay, at its home office in the city of New York, unto Guy C. Phinney, of Seattle, in the county of King, State of Washington, his executors, administrators, or assigns, one hundred thousand dollars, upon acceptance of satisfactory proofs at its home office of the death of said Guy C. Phinney, during the continuance of this policy, upon the following conditions and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part thereof: .

The annual premium of three thousand seven hundred and seventy dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the 24th day of September in every year during the continuance of this contract, until premiums for twenty full years shall have been daily paid to said company.

In witness whereof, The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the 24th day of September, one thousand eight hundred and ninety.

RICHARD A. McCURDY, President.

WM. J. EASTON, Secretary.

[Along the margin of the above is written in ink as follows:]

Man's life, twenty payment. W. J. Easton, Secretary.

The receipt of the first premium is hereby acknowledged.

Twenty year distribution policy.

Annual premium for 20 years.

Provisions, requirements, and benefits.

Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy,

and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. This policy shall become void by nonpayment of premium; all payments previously made shall be forfeited to the company, except as hereinafter provided.

Dividends.—This policy is issued on the twenty-year distribution plan. It will be credited with its distributive share of surplus apportioned after the expiration of twenty years from the date of issue. Only twenty-year distribution policies in force at the end of such term, and entitled thereto by year of issue, shall share in such distribution of the surplus, and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied at the end of such period to purchase additional insurance, or may then be drawn in cash. After the expiration of the period of twenty years hereinbefore provided for, the dividend distribution period shall be changed to terms of five years each during the continuance of this policy. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected in due form not less than two years before the end of the first dividend period of twenty years; otherwise, a satisfactory examination will be required for each such application of the surplus. But should the owner of the policy, at the end of said first period of twenty years, or at the end of any subsequent period of five years, elect to receive the dividend annually, the surplus applicable on this policy

will thereafter be apportioned at the beginning of each year on the anniversary of the date of this policy, and may be applied as hereinbefore provided.

Paid-up Policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof, before default in payment of any premium, or within six months thereafter, issue a non-participating policy, for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full years' premiums paid bears to the total number required.

Surrender.—This policy may be surrendered to the company at the end of said first period of twenty years, and the full reserve computed by the American Table of Mortality, and four per cent interest, and the surplus as defined above will be paid therefor in cash.

Insurance with Annuity.—If the policy be surrendered at the end of the first dividend period as above provided, the company will, if requested in writing, apply its cash value, including surplus, or any part of such value, to purchase without medical examination a paid-up policy for the same amount as the value so applied, securing insurance for life and participating annually in dividends, together with a paid-up annuity for life equal to three and one-half per cent per annum of the amount of the paid-up insurance, payments of the annuity to commence one year after the end of the first dividend period.

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof, the only

conditions which shall be binding upon the holder of this policy are, that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age, and military and naval service in time of war, shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

Notice to the Holder of This Policy.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignment.—The company declines to notice any assignment of this policy until the original or duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

That the said application contained the agreement and condition, that the same was made subject to the laws of the State of New York. That a copy of said application is hereto annexed and marked Exhibit "A" and "B," and by reference thereto is hereby made a part hereof.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

IV.

That on the 12th day of September, in the year 1893, said Guy C. Phinney died in the city of Seattle, State of Washington. That his estate contains a large amount of real and personal property all situated and located in the said city of Seattle and county of King, State of Washington.

V.

That said Guy C. Phinney in his lifetime made and published his last will and testament, wherein he appointed said Nellie Phinney executrix thereof, to act without bonds and without the intervention of any Court, save to prove the execution of said last will and testament. That on or about the 19th day of September, 1893, said will was proved and admitted to probate in the Superior Court of the State of Washington in and for the county of King, and on said day she was duly appointed by said Court executrix thereof, and duly entered upon the discharge of her duties as such executrix.

VI.

That thereupon the plaintiff duly qualified and entered upon the discharge of her duties as executrix, and that said letters testamentary have not been revoked.

VII.

That during the lifetime of said Guy C. Phinney he duly performed all the conditions of said contract by him to be performed.

VIII.

That on or about the 11th day of July, 1894, the plaintiff notified said defendant that said Guy C. Phinney had

died on or about the 12th of September, 1893, and further asked defendant to let her know if defendant required any further preliminaries or required of plaintiff anything further to advise her, and she would comply therewith, and further requested defendant to pay said policy.

IX.

That on the 19th day of July, 1894, the said defendant, in reply to the above, informed and declared to plaintiff that said policy was forfeited on the 24th day of September, 1891, for nonpayment of premium, and that said policy had no value.

X.

That on or about the 27th day of August, 1894, said plaintiff made, executed, and delivered to said defendant good, sufficient, and satisfactory proofs of the death of said Guy C. Phinney, and again requested payment of said policy.

XI.

That on or about the 5th day of September, 1894, said defendant acknowledged receipt of said proofs, and made no objection to the kind, form, sufficiency, or quality of said proofs of death, and made no objection to said proofs in any manner whatsoever.

XII.

That said plaintiff has duly complied with all the conditions of said contract by her necessary to be complied with.

XIII.

That said plaintiff is the owner and holder of said con-

tract, and there is now due her from the said defendant the full sum of one hundred thousand dollars.

XIV.

That said defendant has wholly neglected to pay said policy or any part thereof.

Wherefore plaintiff prays for judgment against said defendant in the full sum of one hundred thousand dollars, with interest thereon from the 19th day of July, 1894, together with her costs and disbursements in this action.

S. WARBURTON,
Atty. for Plaintiff.

State of Washington, }
County of King. } ss.

Nellie Phinney, being first duly sworn, on her oath deposes and says that she is the plaintiff above mentioned; that she has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 13th day of September, 1894.

[Seal.]

AXEL H. SOELBERG,
Notary Public in and for the State of Washington, residing at Seattle, King Co., Washington.

State of Washington, }
County of King. } ss.

Nellie Phinney, being first duly sworn, on her oath deposes and says that she is the plaintiff above named; that

she has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 15th day of January, 1895.

[Seal.]

AXEL H. SOELBERG,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Complaint filed Sep. 24, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Refiled as amended. Refiled January 16, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Received copy of the within-amended complaint, and defendant has until the 25th day of January, 1895, in which to answer the same.

STRUDWICK & PETERS,

Attys. for Deft.

United States Circuit Court for the District of Washington.
NELLIE PHINNEY, Executrix,

vs.

MUTUAL LIFE INS. CO. OF NEW
YORK.

Præcipe for Appearance.

To the Clerk of the above-entitled Court:

You will please enter my appearance as attorney for plaintiff in the above-entitled cause.

S. WARBURTON,

Att'y for Plf.

v. Nellie Phinney, Executrix, etc.

13

[Endorsed]: Praecipe for appearance filed Sept. 24, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk.

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the	}
Estate of GUY C. PHINNEY, Deceased,	
	Plaintiff,
vs.	}
THE MUTUAL LIFE INSURANCE	
COMPANY OF NEW YORK,	
	Defendant.

Summons.

Action brought in the said Circuit Court, and the complaint filed in the office of the clerk of said Circuit Court, in the city of Seattle, King County, State of Washington. The President of the United States of America, Greeting:
To the Mutual Life Insurance Company of New York.

You are hereby required to appear in the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Northern Division, at the city of Seattle, within twenty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiff now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to

you. And, unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in the complaint.

Witness, The Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 24 day of September, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence, the 119th.

[Seal.]

A. REEVES AYRES, Clerk.

By R. M. Hopkins, Deputy Clerk.

United States Marshal's Office, }
District of Washington. }

I hereby certify that I received the within writ on the 24th day of Sept. 1894, and personally served the same on the 25th day of Sept. 1894, by delivering to and leaving with George R. Carter, agt. and assistant cashier of the Mutual Life Insurance Company of New York, said defendants named therein personally, at Seattle, county of King, in said district, a certified copy thereof, together with a copy of the complaint, certified to by R. M. Hopkins, clerk, attached thereto.

JAMES C. DRAKE, U. S. Marshal.

By E. V. Ruger, Deputy.

This 25th

1894.

Marshal's Fees.

To Service & Copy \$5.00

" Mileage 2 @ 12 per mile .24

\$5.24

Paid Sept. 26th, '94.

E. V. Ruger, Dept. U. S. M.

v. Nellie Phinney, Executrix, etc.

15

[Endorsed]: Summons. Filed Sept. 25, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk.

In the Circuit Court of the United States, District of Washington, Northern Division.

N. PHINNEY, Ex'x,

vs.

MUT. LIFE INS. CO. OF N. Y. }

Præcipe for Appearance of Defendant.

To the Clerk of the above-entitled Court:

You will please enter our appearance as attorneys for defendant in the above-entitled cause.

STRUDWICK & PETERS.

[Endorsed]: Præcipe for appearance, filed Oct. 18, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy Clerk.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant. }

Demurrer to Complaint.

Comes now the defendant above named, by Strudwick

& Peters, its attorneys, and demurs to the complaint of the plaintiff herein filed, and for cause of demurrer, says:

I.

That this Court has no jurisdiction of the person of the defendant.

II.

That this Court has no jurisdiction of the subject matter of this action.

III.

That the said complaint does not state facts sufficient to constitute a cause of action against this defendant.

STRUDWICK & PETERS,

Attorneys for Defendant.

Certificate of Counsel.

I, R. C. Strudwick, of counsel for the defendant above named, the Mutual Life Insurance Company of New York, do hereby certify that, in my opinion, the foregoing demurrer is well founded, in point of law.

R. C. STRUDWICK.

[Endorsed]: Demurrer filed Nov. 26, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

*in the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, as Executrix of
the Estate of Guy C. Phinney, De-
ceased.

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
Defendant.

No. 418.

Affidavit of Nellie Phinney as to Loss of Policy.

State of Washington, }
County of King, } ss.

Nellie Phinney being first duly sworn, on her oath de-
poses and says, that she is the plaintiff in the above-
entitled action; that the original policy mentioned in the
complaint has been mislaid or lost; that she is unable to
find it, and does not know where it is; that affiant is in-
formed and believes that the above named defendant has
in its possession and control a duplicate or copy of said
policy made by its agents or officers before the delivery
of the original to Guy C. Phinney; that to the best of her
knowledge and belief the copy set forth in the complaint
is an exact copy of the original policy issued to Guy C.
Phinney.

NELLIE PHINNEY.

Subscribed and sworn to before me this 1st day of
Dec., 1894.

[Seal]

AXEL H. SOELBERG,

Notary Public residing at Seattle, Washington.

[Endorsed]: Affidavit of Nellie Phinney. Filed Dec. 1, 1894. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

General Order Book No. 3. Page 44.

Saturday December 1, 1894.

MUTUAL LIFE INSURANCE CO. }

vs. }

NELLIE PHINNEY, }

Order Overruling Demurrer.

Now, on this day this cause comes on to be heard upon demurrer to the complaint on file herein, and the Court, after hearing the argument of the respective counsel, and being sufficiently advised in the premises, overrules said demurrer, to which ruling of the Court in overruling said demurrer defendant excepts, and its exception is allowed. And defendant is allowed twenty days in which to answer.

And this cause coming further on to be heard upon defendant's exception to the interrogatories, and the Court, after hearing the argument of the respective counsel and being sufficiently advised in the premises, sustains said exception.

And this cause coming further on to be heard upon motion for inspection of policy, and the Court, after hearing argument of the respective counsel, and being sufficiently advised in the premises, denies said motion.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, as Executrix of
the Estate of Guy C. Phinney, De-
ceased.

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
Defendant.

No. 418.

Answer.

Comes now the defendant above named, by Strudwick
& Peters, its attorneys, and, answering the complaint of
the plaintiff filed herein, says:

I.

It has no knowledge or information sufficient to form
a belief as to whether the allegation contained in para-
graph II of said complaint are true or untrue.

II.

It denies so much of paragraph III of said complaint
as alleges that this defendant made or executed or deliv-
ered in the city and State of New York the contract of
life insurance set forth in said paragraph.

III.

It admits that Guy C. Phinney died in the city of Se-
attle, State of Washington, on the 12th day of Sep-
tember, 1893. It has no knowledge or information suffi-
cient to form a belief as to the other allegations, or any
of them, contained in paragraph IV of said complaint.

IV.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph V of said complaint.

V.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph VI of said complaint.

VI.

It denies each and every allegation contained in paragraph VII of said complaint.

VII.

It denies each and every allegation contained in paragraph VIII of said complaint.

VIII.

It denies each and every allegation contained in paragraph X of said complaint.

IX.

It denies each and every allegation contained in paragraph XI of said complaint.

X.

It denies each and every allegation contained in paragraph XII of said complaint.

XI.

It denies each and every allegation contained in paragraph XIII of said complaint.

For the first affirmative defense, the defendant alleges:

I.

That this defendant is, and was at all the times mentioned in the complaint, created, organized, and existing under and by virtue of the laws of the State of New York, and is and was at all the said times engaged in transacting a life insurance business in the State of Washington, under and by virtue of and pursuant to the laws of the State of Washington aforesaid, having its principal office for the transaction of business in said State at the city of Seattle, Washington.

II.

That on or about the 22nd day of September, 1890, one Guy C. Phinney, being the same Guy C. Phinney named in the complaint, made, signed and delivered to defendant, at its office in Seattle aforesaid, written application to defendant for a policy of insurance upon his life in the sum of one hundred thousand (\$100,000 dollars; which application became and was pursuant to its own terms and the terms of the policy hereinafter mentioned, a part of said policy and of the contract of insurance evidenced thereby.

III.

That said application contained, among other things, a stipulation and condition to the effect that the policy to be issued by defendant pursuant thereto, "shall not take effect until the first premium shall have been paid, and the policy shall have been delivered."

IV.

That thereupon the agent of defendant in Seattle aforesaid transmitted said application of the said Guy C. Phinney to the agent of defendant in San Francisco, California, by whom the said application was transmitted to defendant in the city and State of New York.

V.

That thereafter, to wit, on the twenty first day of October, 1890, defendant, pursuant to said application, transmitted the policy of insurance referred to in the complaint to its agent in San Francisco aforesaid; and thereafter, to wit, on the twenty eighth day of October, 1890, the agent of the defendant at San Francisco aforesaid transmitted the said policy of insurance to the agent of defendant in Seattle aforesaid for delivery of the same to the said Guy C. Phinney, provided the said Guy C. Phinney should pay to defendant in Seattle the premium due upon said policy; and said last named agent in Seattle aforesaid, on or about the first day of November, 1890, delivered the said policy to said Guy C. Phinney, and the said Guy C. Phinney then and there paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in the complaint, as one of the conditions thereof, as follows:

"The annual premium of thirty seven hundred and seventy (\$3700) dollars shall be paid in advance on the date

ary of this policy, and thereafter to the company at its home office in the city and State of New York on the 24th day of September in every year during the continuance of this contract until premiums for twenty (20) full years shall have been duly paid to said company."

And it is therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the secretary or president. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy; and any further notice required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company."

VII.

That pursuant to the conditions of said policy aforesaid there became and was due defendant, as a premium upon said policy of insurance on the 24th day of September, 1894, the sum of thirty seven hundred and seventy (\$3776) dollars; and the said day C. Phinney failed, neglected, and refused to pay the said sum of thirty seven hundred and seventy (\$3776) dollars, or any part thereof, and ever since that time up to the time of the death of the

said Guy C. Phinney he failed, neglected, and refused to pay to defendant the said sum or any part thereof, by reason whereof, the said policy of insurance became, on the 24th day of September, 1891, according to the conditions aforesaid, void and of no effect.

For a second affirmative defense, the defendant alleges:

I.

That after the delivery of the policy of insurance mentioned in the complaint to Guy C. Phinney in the manner aforesaid, and during the lifetime of the said Guy C. Phinney, said contract of insurance evidenced by the said policy was waived, abandoned, and rescinded by the parties thereto.

For a third affirmative defense the defendant alleges:

I.

That as a consideration of the contract of insurance mentioned in the complaint, and as a part thereof, and as a condition precedent to defendant's liability thereon, said Guy C. Phinney, before the issuance and delivery of the policy of insurance mentioned in the complaint, warranted to defendant as follows:

That he was temperate in his habits, and also that he had no acquired or hereditary predisposition to rheumatism or gout, and also that he had never had rheumatism or gout.

II.

That defendant issued and delivered to the said Guy C. Phinney the policy of insurance mentioned in the com-

plaint, in consideration of the warranties aforesaid, and of each of them, and upon the faith of the truth of the same and of each of them.

III.

That each and all of said warranties were, at the time the same were made as aforesaid, untrue; that in truth and in fact the said Guy C. Phinney at the time aforesaid, had an acquired and an hereditary predisposition to rheumatism and to gout, and had had rheumatism and gout. And in truth and in fact the said Guy C. Phinney, at the time aforesaid, was not temperate in his habits, but was, on the contrary, then addicted to the intemperate drinking of wines, spirits, and malt liquors.

For a fourth affirmative defense, the defendant alleges:

That as defendant is informed and verily believes plaintiff herein relies upon an alleged noncompliance by the defendant with the laws of the State of New York for the year 1876, chapter 344, as amended by the laws of the State of New York for the year 1877, chapter 321, and upon the construction of said law as claimed by the plaintiff that said law required notice thereunder to be sent by the defendant to residents of the State of Washington. Defendant alleges that said law, in so far as it may be construed to impose the duty of sending notices to residents outside of the State of New York in connection with policies which became completed contracts without the State of New York, and in so far as it may be construed not to permit any waiver of the sending of such notices by contract with the parties thereto, is invalid, in that it is in violation of and repugnant to the

Constitution of the United States, and said statute never became a law, and is void, and the particular grounds of said repugnance are that the said statute as aforesaid would be a denial to this defendant by the States of New York and Washington of the equal protection of their laws, and would be a deprivation by the said States of the property of the defendant without due process of law, and would be a regulation of commerce in the several States, and would interfere with the sovereignty of the State of Washington, and would affect property and business without the jurisdiction of the State of New York, and under the rights, titles, privileges, and immunities which belong to the defendant under the Constitution of the United States, and which it hereby severally sets up, and claims it was not obliged to send notice to the said Guy C. Phinney, and said law construed as aforesaid violates the Constitution of the United States in that it is a law impairing the obligation of contracts.

Wherefore the defendant prays to be hence dismissed with its costs.

STRUDWICK & PETERS,
Attorneys for Defendant.

United States of America, }
District of Washington. } ss.

Wm. S. Pond, being first duly sworn, on oath says: That he is the manager for the State of Washington for defendant in the above-entitled action; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true.

WM. S. POND.

Subscribed and sworn to before me this 24th day of Dec., A. D. 1894.

[Seal]

W. A. PETERS.

Notary Public in and for Washington, residing at Seattle.

[Endorsed]: Answer filed Dec. 26, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Received a copy of the within answer this 24th day of December, 1894.

S. WARBURTON,

Attorney for Plf.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the
Estate of Guy C. Phinney, Deceased,
Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
Defendant.

Demurrer to Answer.

Comes now the above named plaintiff by her attorney, S. Warburton, and demurs to the answer of defendant, as follows:

I.

Plaintiff demurs to the first affirmative defense set out in defendant's answer, and for cause of demurrer alleges that said first affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

II.

Plaintiff demurs to the second affirmative defense set forth in defendant's answer, and for cause of demurrer alleges that said second affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

III.

Plaintiff demurs to the third affirmative defense set forth in defendant's answer, and for cause of demurrer alleges that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

IV.

Plaintiff demurs to the fourth affirmative defense set forth in defendant's answer, and for cause of demurrer alleges that said affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

S. Warburton,
Attorney for Plaintiff.

Certificate of Counsel.

I, S. Warburton, attorney for the plaintiff above named, do hereby certify that, in my opinion, each of the foregoing demurrers are well founded on point of law.

S. Warburton.

Received a copy of the within demurrer this 28th day of Dec., 1894.

STRUDWICK & PETERS.

[Endorsed]: Demurrer filed Dec. 28, 1894, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the Estate of GUY C. PHINNEY, Deceased,	} No. 418.
Plaintiff,	
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	} Defendant.

Answer to Amended Complaint.

Comes now the defendant above named, and, answering the amended complaint of the plaintiff filed herein, says:

I.

It has no knowledge or information sufficient to form a belief as to whether the allegations contained in paragraph II of said Amended Complaint are true or untrue.

II.

It denies so much of paragraph III of said Amended Complaint as alleges that this defendant made or executed or delivered in the city and State of New York, the contract of life insurance set forth in said paragraph, or that the consideration of said contract was other than is stated in said contract. It admits that a copy of said application is annexed to said complaint, and it admits that said application contains the following clause: "This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the com-

pany and the laws of the State of New York," and, except as hereinbefore admitted, it denies each and every allegation contained in said paragraph III.

III.

It admits that Guy C. Phinney died in the city of Seattle, State of Washington, on the 12th day of September, 1893. It has no knowledge or information sufficient to form a belief as to the other allegations or any of them contained in paragraph IV of said amended complaint.

IV.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them contained in paragraph V of said amended complaint.

V.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them contained in paragraph VI of said amended complaint.

VI.

It denies each and every allegation contained in paragraph VII of said amended complaint.

VII.

It denies each and every allegation contained in paragraph VIII of said amended complaint.

VIII.

It denies each and every allegation contained in paragraph X of said amended complaint.

IX.

It denies each and every allegation contained in paragraph XI of said amended complaint.

X.

It denies each and every allegation contained in paragraph XII of said amended complaint.

XI.

It denies each and every allegation contained in paragraph XIII of said amended complaint.

For a first affirmative defense, the defendant alleges:

I.

That the defendant is, and was at all the times mentioned in the amended complaint, a corporation, created, organized, and existing under the and by virtue of the laws of the State of New York, and is and was at all said times, engaged in transacting a Life Insurance business in the State of Washington, under and by virtue of, and pursuant to the laws of the State of Washington aforesaid, having its principal office for the transaction of business in said State, at the city of Seattle, Washington.

II.

That on or about the 22nd day of September, 1890, one Guy C. Phinney, being the same Guy C. Phinney named in the said complaint and who was at all times herein mentioned, a citizen and resident of the State of Washington, made, signed, and delivered to defendant, at its office in Seattle aforesaid, his written application

to defendant for a policy of insurance upon his life in the sum of one hundred thousand (\$100,000) dollars; which application became and was, pursuant to its own terms, and the terms of the policy hereinafter mentioned, a part of said policy, and of the contract of insurance evidenced thereby.

III.

That said application contained, among other things a stipulation and condition to the effect that the policy to be issued by defendant pursuant thereto, "shall not take effect until the first premium shall have been paid, and the policy shall have been delivered."

IV.

That thereupon, the agent of defendant in Seattle aforesaid transmitted said application of the said Guy C. Phinney to the agent of defendant in San Francisco, California, by whom the said application was transmitted to defendant in the city and State of New York.

V.

That thereafter, to wit, on the twenty first day of October, 1890, defendant, pursuant to said application, transmitted the policy of insurance referred to in the said complaint, to its agent in San Francisco aforesaid; and thereafter, to wit, on the twenty eighth day of October, 1890, the agent of the defendant, at San Francisco, aforesaid, transmitted the said policy of insurance to the agent of defendant in Seattle, aforesaid, for delivery of the same to the said Guy C. Phinney, provided the said Guy C. Phinney should pay to defendant in Seattle, the premium due upon said policy; and said last named agent

in Seattle aforesaid, on or about the first day of November, 1890, delivered the said policy to said Guy C. Phinney, and the said Guy C. Phinney then and there paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in the said complaint, as one of the conditions thereof, as follows:

"The annual premium of thirty-seven hundred and seventy (\$3,770) dollars, shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of and State of New York, on the 24th day of September in every year during the continuance of this contract until premiums for twenty (20) full years shall have been duly paid to said company."

And it was therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the secretary or president. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy; and any further notice required by any statute is hereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company."

VII.

That pursuant to the conditions of the said policy aforesaid, there became and was due to the defendant, as a premium upon said policy of insurance, on the 24th day of September, 1891, the sum of thirty-seven hundred and seventy (\$3,770) dollars, and the said Guy C. Phinney failed, neglected, and refused to pay the said sum of thirty-seven hundred and seventy(\$3,770) dollars, or any part thereof, and ever since that time, and up to the time of the death of the said Guy C. Phinney, he failed, neglected, and refused to pay to defendant the said sum or any part thereof; by reason whereof, the said policy of insurance became, on the 24th day of September, 1891, according to the conditions aforesaid, void and of no effect.

For a second affirmative defense the defendant alleges:

I.

That after the delivery of the policy of insurance mentioned in the said complaint, to Guy C. Phinney in the manner aforesaid, and during the lifetime of the said Guy C. Phinney said contract of insurance evidenced by said policy was waived, abandoned, and rescinded by the parties thereto.

For a third affirmative defense, the defendant alleges:

I.

That as a consideration of the contract of insurance mentioned in the said complaint, and as a part thereof, and as a condition precedent to defendant's liability

thereon, said Guy C. Phinney, before the issuance and delivery of the policy of insurance mentioned in the complaint, warranted to defendant as follows:

That he was temperate in his habits, and also that he had no acquired or hereditary predisposition to rheumatism or gout, and also that he had never had rheumatism or gout.

II.

The defendant issued and delivered to the said Guy C. Phinney the policy of insurance mentioned in the said complaint, in consideration of the warranties, aforesaid, and of each of them, and upon the faith of the truth of the same, and of each of them.

III.

That each and all of said warranties were, at the time the same were made as aforesaid, untrue; that in truth and in fact the said Guy C. Phinney at the time aforesaid had an acquired and an hereditary predisposition to rheumatism and gout, and had had rheumatism and gout. And in truth and in fact the said Guy C. Phinney, at the time aforesaid, was not temperate in his habits, but was, on the contrary, then addicted to the intemperate drinking of wines, spirits, and malt liquors.

For a fourth affirmative defense, the defendant alleges:

That as defendant is informed and verily believes, plaintiff herein relies upon an alleged noncompliance by the defendant with the laws of the State of New York for the year 1876, chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321,

and upon the construction of the said law as claimed by the plaintiff that said law required notice thereunder to be sent by the defendant to residents of the State of Washington. Defendant alleges that said law in so far as it may be construed to impose the duty of sending notices to residents outside of the State of New York, in connection with policies which became completed contracts either within or without the State of New York and in so far as they may be construed not to permit any waiver of the sending of such notices by contract between the parties thereto, is invalid, in that it is in violation of and repugnant to the Constitution of the United States, and said statute never became a law, and is void, and the particular grounds of said repugnance are that the said statute as aforesaid would be a denial to this defendant by the States of New York and Washington of the equal protection of their laws, and would be a deprivation by the said States of the property of the defendant without due process of law, and would be a regulation of commerce in the several states, and would interfere with the sovereignty of the State of Washington, and would affect property and business without the jurisdiction of the State of New York, and under the rights, titles, privileges, and immunities which belong to the defendant under the Constitution of the United States and which it hereby severally sets up and claims it was not obliged to send notice to the said Guy C. Phinney, and said law violates the Constitution of the United States in that it is a law impairing the obligation of contracts.

Wherefore, the defendant prays to be hence dismissed with its costs.

E. LYMAN SHORT & STRUDWICK & PETERS,
Attorneys for Defendant.

United States of America, }
District of Washington. } ss.

William S. Pond, being first duly sworn, on oath, says: That he is general agent for the State of Washington for defendant in the above-entitled action, and is an agent of defendant, authorized by defendant, to solicit insurance in the State of Washington; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true; that he makes this affidavit on behalf of said defendant.

WM. S. POND.

Subscribed and sworn to before me this 24th day of January, 1895.

[Seal]

JOHN D. ATKINSON,
Notary Public in and for the State of Washington, Residing at Seattle.

Received copy of within answer this 24th day of Jan'y, 1895.

S. WARBURTON.

By A. F. Burleigh,
Att'y for Plff.

[Endorsed]: Answer to Amended Complaint. Filed Jan. 24, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division,*

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, De- ceased,	}	Plaintiff,
vs.		
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,		
Defendant,		/

Appearance for Defendant.

To the Clerk of the United States Circuit Court for the
Northern District of Washington:

Please enter my appearance as one of the solicitors for
the defendant in the above action.

Dated Jan. 16, 1895.

EDWARD LYMAN SHORT.

[Endorsed]: Notice of appearance filed Jan. 25, 1895,
in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By
R. M. Hopkins, Deputy.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

Notice of Hearing.

To the above named defendant and to Strudwick &
Peters, its attorneys.

Please take notice that the above-named plaintiff
herein will call up for hearing and argument the an-
nexed demurrer on the 4th day of February, 1895, at 11
o'clock, A. M., in the above court, or as soon thereafter as
counsel can be heard in the courtroom of said court in the
city of Seattle, King county, Washington.

S. WARBURTON,

Attorney for Plaintiff

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, Executrix of the Estate of GUY C. PHINNEY, De- ceased,	Plaintiff,	No. 418.
vs.		
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	Defendant.	

Demurrer to Amended Answer.

Comes now the above-named plaintiff, by her attorney,
S. Warburton, and demurs to the amended answer of
defendant as follows:

I.

Plaintiff demurs to the first affirmative defense set out
in defendant's amended answer, and for cause of demur-
rer alleges that said first affirmative defense does not
state facts sufficient to constitute a defense to plaintiff's
complaint.

II.

Plaintiff demurs to the second affirmative defense set
forth in defendant's amended answer, and for cause of
demurrer alleges that said second affirmative defense
does not state facts sufficient to constitute a defense to
plaintiff's complaint.

III.

Plaintiff demurs to the second affirmative defense set
forth in defendant's amended answer, and for cause of

demurrer alleges that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.

IV.

Plaintiff demurs to the fourth affirmative defense set forth in defendant's amended answer, and for cause of demurrer alleges that said affirmative defense does not state facts sufficient to constitute a defense to plaintiff's complaint.

S. Warburton,

Attorney for Plaintiff.

CERTIFICATE OF COUNSEL.

I, S. Warburton, attorney for the plaintiff in the above-entitled action, do hereby certify that in my opinion each of the foregoing demurrers are well founded on point of law.

S. Warburton.

Received a copy of the within notice and demurrer this 28th day of January, 1895.

Strudwick & Peters,

Attorneys for Defendant.

Notice and demurrer filed January 28, 1895, in the United States Circuit Court.

A. Reeves Ayres, Clerk.

By R. M. Hopkins, Deputy.

General Order Book No. 3, Page 194.

Tuesday, March 26, 1896

NELLIE PHINNEY, Executrix,

vs.

THE MUTUAL LIFE INSURANCE CO. }

Order Sustaining Demurrer to Answer

Now on this day it is ordered by the court that the demurrer to the answer heretofore, on March 21st, 1896, taken under advisement, be and the same is hereby sustained as to the first, second, third, and fourth affirmative defenses; to which ruling of the Court in sustaining said demurrer defendant excepts, and its exception is allowed, and defendant is given twenty days in which to amend its answer.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the

Estate of GUY C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE

COMPANY OF NEW YORK,

Defendant. }

No. 412

Amended Answer to Amended Complaint.

Comes now the defendant above named, and by leave of the court files herein its amended answer to the plaintiff's amended complaint, and says:

I

It has no knowledge or information sufficient to form a belief as to whether the allegations contained in paragraph II of said amended complaint are true or untrue.

II

It denies so much of paragraph III of said amended complaint as alleges that this defendant made or executed or delivered in the city and State of New York the contract of life insurance set forth in said paragraph, or that the considerations of said contract were other than is stated in said contract. It admits that a copy of said application is annexed to said complaint, and it admits that said application contains the following clause: "This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York." And, except as heretofore admitted, it denies each and every allegation contained in said paragraph III.

III

It admits that Guy C. Phinney died in the city of Seattle, the State of Washington, on the 12th day of September, 1893. It has no knowledge or information sufficient to form a belief as to the other allegations, or any of them, contained in paragraph IV of said amended complaint.

IV

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph V of said amended complaint.

V.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph VI of said amended complaint.

VI.

It denies each and every allegation contained in paragraph VII of said amended complaint.

VII.

It denies each and every allegation contained in paragraph VIII of said amended complaint.

VIII.

It denies each and every allegation contained in paragraph IX of said amended complaint, except the allegation that the defendant stated "that said policy had no value."

IX.

It denies each and every allegation contained in paragraph X of said amended complaint.

X.

It denies each and every allegation contained in paragraph XI of said amended complaint.

XI.

It denies each and every allegation contained in paragraph XII of said amended complaint.

XII.

It denies each and every allegation contained in paragraph XIII of said amended complaint.

For a first affirmative defense, the defendant alleges:

I

That the defendant is, and was at all the time mentioned in the amended complaint, a corporation created, organized, and existing under and by virtue of the laws of the State of New York, and is and was at all the said times engaged in transacting a life insurance business in the State of Washington, under and by virtue of, and pursuant to the laws of, the State of Washington aforesaid, having its principal office for the transaction of business in said State at the city of Seattle, Washington.

II

That on or about the 33d day of September, 1900, one Guy C. Phinney, named in the said complaint, and who was at all times herein mentioned a citizen and resident of the State of Washington, made, signed, and delivered to defendant, at its office in Seattle aforesaid, his written application to defendant for a policy of insurance upon his life in the sum of one hundred thousand (\$100,000) dollars, which application became and was, pursuant to its own terms and the terms of the policy heretofore mentioned, a part of said policy, and of the contract of insurance evidenced thereby.

III

That said application contained, among other things, a stipulation and condition to the effect that the policy to be issued by defendant pursuant thereto "shall not take effect until the first premium shall have been paid and the policy shall have been delivered."

IV.

That thereupon the agent of defendant in Seattle aforesaid transmitted said application of the said Guy C. Phinney to the agent of defendant in San Francisco, California, by whom the said application was transmitted to defendant in the State and city of New York.

V.

That thereafter, to-wit, on the twenty-first day of October, 1890, defendant, pursuant to said application, transmitted the policy of insurance referred to in the said complaint to its agent in San Francisco aforesaid; and thereafter, to-wit, on the twenty-eighth day of October, 1890, the agent of the defendant at San Francisco aforesaid transmitted the said policy of insurance to the agent of defendant in Seattle aforesaid, for delivery of the same to the said Guy C. Phinney, provided the said Guy C. Phinney should pay to defendant in Seattle the premium due upon said policy; and said last named agent in Seattle aforesaid, on or about the first day of November, 1890, delivered the said policy to said Guy C. Phinney, and the said Guy C. Phinney then and there paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in the said complaint, as one of the conditions thereof, as follows:

"The annual premium of thirty-seven hundred and seventy (\$3770) dollars shall be paid in advance on the

delivery of this policy, and thereafter to the company at its home office in the city and State of New York, on the 24th day of September in every year during the continuance of this contract until the premiums for twenty (20) full years shall have been duly paid to said company."

And it was therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the secretary or president. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy; and any further notice required by any statute is hereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company."

VII

That pursuant to the conditions of the said policy aforesaid there became and was due to the defendant, as a premium upon said policy of insurance, on the 24th day of September, 1901, the sum of thirty seven hundred and seventy (\$3770) dollars; and the said Gay C. Phinney failed, neglected, and refused to pay the said sum of thirty seven hundred and seventy (\$3770) dollars, or any part thereof, and ever since that time and up to the time

of the death of the said Guy C. Phinney, he failed, neglected, and refused to pay to defendant the said sum, or any part thereof, or any other sum, or other thing of value whatever; by reason whereof the said policy of insurance became, on the 24th day of September, 1891, according to the conditions aforesaid, void and of no effect.

For a second affirmative defense the defendant alleges:

I.

That at a time more than one (1) year from the time of issuance of the policy mentioned in the said complaint by the defendant to said Guy C. Phinney, and during the lifetime of said Guy C. Phinney, it was mutually agreed between the defendant and the said Guy C. Phinney, that the said contract of insurance should be waived, abandoned, and rescinded; and the said Guy C. Phinney and the defendant then mutually waived, abandoned, and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder; and in pursuance of said agreement said Guy C. Phinney delivered up the said policy of insurance to the defendant.

For a third affirmative defense the defendant alleges:

I.

That as a consideration of the contract of insurance mentioned in the said complaint, and as a part thereof, and as a condition precedent to defendant's liability thereon, said Guy C. Phinney, before the issuance and

delivery of the policy of insurance mentioned in the said complaint, warranted to defendant as follows:

That he was temperate in his habits, and also that he had no acquired or hereditary predisposition to rheumatism or gout, and that he had never had rheumatism or gout.

II.

That defendant issued and delivered to the said Guy C. Phinney the policy of insurance mentioned in the said complaint, in consideration of the warranties aforesaid, and of each of them, and upon the faith of the truth of the same and of each of them.

III.

That each and all of said warranties were, at the time the same were made, untrue; that in truth and in fact the said Guy C. Phinney, at the time aforesaid, had an acquired and an hereditary predisposition to rheumatism and to gout, and had had rheumatism and gout. And in truth and in fact the said Guy C. Phinney, at the time aforesaid, was not temperate in his habits, but was, on the contrary, then addicted to the intemperate drinking of wines, spirituous, and malt liquors.

Wherefore, the defendant prays to be hence dismissed with its costs.

E. LYMAN SHORT and
STRUDWICK & PETERS,
Attorneys for Defendant.

United States of America, }
District of Washington. } ss.

Abraham W. Engle, being first duly sworn, on oath

deposes and says: That he is one of the agents for the State of Washington for the defendants in the above entitled action, authorized by defendant to solicit insurance in the State of Washington; that he has heard the foregoing amended answer read, knows the contents thereof, and believes the same to be true; that he makes this affidavit on behalf of said defendant because said defendant is a foreign corporation.

ABRAHAM W. ENGLE.

Subscribed and sworn to before me this 15th day of April, 1895.

[Seal.]

C. E. REMSBERG,

Notary Public in and for the State of Washington, residing at Seattle.

Received a copy of this answer 15 April, 1895.

B. WARBURTON,

Attorney

By Douglas Young

[Endorsed]: Amended Answer. Filed April 15, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, Executrix of the Estate of CHAS. C. PHINNEY, De- ceased,	} No. 110
Plaintiff,	
vs	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	} Defendant
Defendant	

Reply to Affirmative Defense

Comes now the above named plaintiff, and, in reply to
the affirmative defense, says:

I.

Plaintiff admits the allegations contained in the third
paragraph of the first affirmative defense, and plaintiff
further alleges that said application contained the further
provision: "I have paid \$ to the subscribing sell-
ing agent, and have been furnished with binding receipt
signed by the secretary of the company, to make the
insurance herein applied for binding from date, provided
the policy shall be issued by the company."

II.

Plaintiff says she has no knowledge or information
sufficient to form a belief as to the allegations contained
in the fourth paragraph of the first affirmative defense.

III.

Plaintiff says she has not sufficient knowledge or in-

formation to form a belief as to any of the allegations contained in paragraph five of the first affirmative, save the allegation that the policy referred to in plaintiff's complaint was delivered to Guy C. Phinney, and that the first premium was paid thereon. Plaintiff further alleges that the premium mentioned in said paragraph was paid on or about the 22nd day of September, 1890, and at the same time and place that application referred to in plaintiff's complaint and defendant's answer was delivered to said defendant.

IV.

Plaintiff denies each and every allegation contained in paragraph seven of defendant's first affirmative defense.

Reply to second affirmative defense.

Plaintiff denies each and every allegation contained in defendant's second affirmative defense.

For a first and further reply to the allegations contained in defendant's second affirmative defense plaintiff alleges:

I.

That said policy of insurance in said second affirmative defense contained the following agreement and condition:

Incontestability.—It is hereby further promised and agreed that after two years from the date thereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after

the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890.

That said Guy C. Phinney died on the 12th day of September, 1893. That during all the time, up to the time of his death on the 12th day of September, 1893, and more than two years after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's second affirmative defense plaintiff says:

I.

That the said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney, and just prior to his death, he informed and declared to plaintiff he was insured in defendant company in the sum of one hundred thousand dollars.

II.

That after his death and prior to the commencement of this action plaintiff, duly believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and, in order that she might procure the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to

the payment of said policy. That at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That therefore with full knowledge of all the facts it denied liability to plaintiff on the said policy on one ground only, viz: that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium, and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at great expense to herself procured the services of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and therefore did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of fifty dollars.

Reply to third affirmative defense.

I.

Plaintiff denies each and every allegation contained in paragraph one of defendant's third affirmative defense, not admitted or alleged to be true in plaintiff's complaint.

II.

Plaintiff says she has no knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph two of defendant's third affirmative defense.

III.

Plaintiff denies each and every allegation contained in paragraph three of defendant's third affirmative defense.

For a first and further reply to the allegations contained in defendant's third affirmative defense plaintiff alleges:

I.

That said policy of insurance mentioned in said second affirmative defense, contained the following agreement and condition:

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890; that said Guy C. Phinney died on the 12th day of September, 1893; that during all the time up to the time of his death on the 12th day of September, 1893, and more than two years after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly

performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's third affirmative defense plaintiff says:

I.

That said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney and just prior to his death he informed and declared to plaintiff he was insured in defendant company in the sum of one hundred thousand dollars.

II.

That after his death and prior to the commencement of this action plaintiff, fully believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and, in order that she might procure the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to the payment of said policy; that at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That thereafter with full knowledge of all the facts it denied liability to plaintiff on the said policy on one ground only, viz: that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium, and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at a great expense to herself procured the services of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and therefore did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of fifty dollars.

Wherefore, plaintiff prays that she may have judgment against said defendant as prayed for in her complaint.

S. WARBURTON,

Atty. for Plaintiff.

State of Washington, }
County of Pierce. } ss.

Nellie Phinney, being first duly sworn, on her oath, deposes and says: That she is the plaintiff above named; that she has read the foregoing report, knows the contents thereof, and that the same are true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 23 day of April, 1895.

[Seal.]

AXEL H. SOELBERG,

Notary Public in and for the State of Washington, residing in Tacoma.

[Endorsed]: Reply. Filed Apl. 23, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

No. 418.

Second Amended Answer.

Comes now the defendant above named, and by leave of the Court files herein its Second Amended Answer to the plaintiff's amended complaint, and says:

I.

It has no knowledge or information sufficient to form a belief as to whether the allegations contained in paragraph II of said amended complaint are true or untrue.

II.

It denies so much of paragraph III of said amended complaint as alleges that this defendant made or executed or delivered in the city and State of New York the contract of life insurance set forth in said paragraph, or that the consideration of said contract was other than is stated in said contract. It admits that a copy of said application is annexed to said complaint, and it admits that said application contains the following clause:

"This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and the laws of the State of New York," and, except as hereinbefore admitted, it denies each and every allegation contained in said paragraph III.

III.

It admits that Guy C. Phinney died in the city of Seattle, State of Washington, on the 12th day of September, 1893. It has no knowledge or information sufficient to form a belief as to the other allegations, or any of them, contained in paragraph IV of said amended complaint.

IV.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph V of said amended complaint.

V.

It has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph VI of said amended complaint.

VI.

It denies each and every allegation contained in paragraph VII of said amended complaint.

VII.

It denies each and every allegation contained in paragraph VIII of said amended complaint.

VIII.

It denies each and every allegation contained in para-

graph IX of said amended complaint, except the allegation that the defendant stated that said policy had no value.

IX.

It denies each and every allegation contained in paragraph X of said amended complaint.

X.

It denies each and every allegation contained in paragraph XI of said amended complaint.

XI.

It denies each and every allegation contained in paragraph XII of said amended complaint.

XII.

It denies each and every allegation contained in paragraph XIII of said amended complaint.

For a first affirmative defense the defendant alleges:

I.

That the defendant is, and was at all the times mentioned in the amended complaint, a corporation, created, organized, and existing under and by virtue of the laws of the State of New York, and is and was at all the said times engaged in transacting a life insurance business in the State of Washington, under and by virtue of and pursuant to the laws of the State of Washington aforesaid, having its principal office for the transaction of business in said State, at the city of Seattle, Washington.

II.

That on or about the 22nd day of September, 1890, one Guy C. Phinney, being the same Guy C. Phinney named in the said complaint, and who was at all times herein-mentioned a citizen and resident of the State of Washington, made, signed, and delivered to defendant, at its office in Seattle aforesaid, his written application to defendant for a policy of insurance upon his life in the sum of one hundred thousand (\$100,000) dollars; which application became and was, pursuant to its own terms and the terms of the policy hereinafter mentioned, a part of said policy and of the contract of business evidenced thereby.

III.

That said application contained, among other things, a stipulation and condition to the effect that the policy to be issued by defendant pursuant thereto "shall not take effect until the first premium shall have been paid and the policy shall have been delivered."

IV.

That thereupon the agent of defendant in Seattle aforesaid transmitted said application of the said Guy C. Phinney to the agent of defendant in San Francisco, California, by whom the said application was transmitted to defendant in the city of and State of New York.

V.

That thereafter, to-wit, on the twenty first day of October, 1890, defendant, pursuant to said application, transmitted the policy of insurance referred to in the said com-

plaint to its agent in San Francisco aforesaid; and thereafter, to-wit, on the twenty-eighth day of October, 1890, the agent of the defendant at San Francisco aforesaid transmitted the said policy of insurance to the agent of defendant in Seattle aforesaid, for delivery of the same to the said Guy C. Phinney, provided the said Guy C. Phinney should pay to defendant in Seattle the premium due upon said policy, and said last-named agent in Seattle aforesaid, on or about the first day of November, 1890, delivered the said policy to said Guy C. Phinney, and the said Guy C. Phinney then and there paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in said complaint, as one of the conditions thereof, as follows:

"The annual premium of thirty-seven hundred and seventy (\$3770) dollars shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city and State of New York, on the 24th day of September in every year during the continuance of this contract until the premiums for twenty (20) full years shall have been duly paid to said company."

And it was therein further provided, as a condition of said contract as follows, to-wit:

"Each premium is due and payable at the home office in the city of New York, but will be accepted when duly made in exchange for the company's receipt, signed by the secretary or president. Notice that each and every such

payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy; and any further notice required by any statute is hereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company."

VII.

That pursuant to the conditions of the said policy as said there became and was due to the defendant, as a premium upon said policy of insurance, on the 24th day of September, 1891, the sum of thirty-seven hundred and seventy (\$3770) dollars; and the said Guy C. Phinney failed, neglected, and refused to pay the said sum of thirty-seven hundred and seventy (\$3770) dollars, or any part thereof, and ever since that time and up to the time of the death of the said Guy C. Phinney he failed, neglected, and refused to pay to defendant the said sum, or any part thereof, or any other sum, or other thing of value whatever; by reason whereof, the said policy of insurance became, on the 24th day of September, 1891, according to the conditions aforesaid, void and of no effect.

For a second affirmative defense the defendant alleges:

I.

That at a time more than one (1) year from the time of issuance of the policy mentioned in the said complaint by the defendant to said Guy C. Phinney, and during the

lifetime of said Guy C. Phinney, it was mutually agreed between the defendant and the said Guy C. Phinney that the said contract of insurance should be waived, abandoned, and rescinded, and the said Guy C. Phinney and the defendant then mutually waived, abandoned, and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder; and, in pursuance of said agreement, said Guy C. Phinney delivered up the said policy of insurance to the defendant.

For a third affirmative defense the defendant alleges:

I.

That as a consideration of the contract of insurance mentioned in the said complaint, and as a part thereof, and as a condition precedent to defendant's liability thereon, said Guy C. Phinney, before the issuance and delivery of the policy of insurance mentioned in the said complaint, warranted to defendant as follows:

That he was temperate in his habits and that his former habit of drinking wine, spirits, and malt liquors was always temperate, and also that he had no acquired or hereditary predisposition to rheumatism or gout, and that he had never had rheumatism or gout.

II.

The defendant issued and delivered to the said Guy C. Phinney the policy of insurance mentioned in the said complaint, in consideration of the warranties aforesaid, and of each of them, and upon the faith of the truth of the same and of each of them.

III.

That each and all of said warranties were, at the time the same were made, untrue; that in truth and in fact the said Guy C. Phinney, at the time aforesaid, had an acquired and an hereditary predisposition to rheumatism and to gout, and had had rheumatism and gout. And in truth and in fact the said Guy C. Phinney, at the time aforesaid, was intemperate in his habits, and was then habitually addicted to the intemperate drinking of wines, spirits, and malt liquors; and in truth and in fact the said Phinney's former habit of drinking wines, spirits, and malt liquors had been intemperate, in that the said Guy C. Phinney for many years prior to said date had been constantly and habitually addicted to the intemperate drinking of wines, spirits, and malt liquors.

For a fourth affirmative defense the defendant alleges:

That on or about the — day of December, 1891, the said Guy C. Phinney delivered and surrendered to defendant the policy sued on in this action, with the understanding and agreement then and there had between Guy C. Phinney and defendant that said policy had become lapsed and forfeited, and of no force and effect whatever; and that neither party thereto was thereafter to be bound thereby. And from said time until the death of said Phinney, on September 12th, 1893, and for nine months after the death of said Guy C. Phinney, the same was understood and agreed by plaintiff and by plaintiff's testator, Guy C. Phinney, and defendant to be a lapsed and forfeited policy; and by reason of such understanding and agreement, and by reason of such conduct of said

plaintiff and of plaintiff's testator, Guy C. Plimney, which was known to defendant, and relied upon by it, plaintiff is estopped from claiming, and ought not to be allowed to claim, that said policy is in force and effect, and binding upon defendant. Wherefore, the defendant prays to be hence dismissed with its costs.

E. LYMAN SHORT,

STRUDWICK & PETERS,

Attorneys for Defendant.

United States of America, }
District of Washington. } ss.

William S. Pond, being first duly sworn, on oath, deposes and says: That he is the general agent for the State of Washington for the defendant in the above entitled action, and is an agent of defendant, authorized by defendant to solicit insurance in the State of Washington; that he has heard the foregoing Second Amended Answer read, knows the contents thereof, and believes the same to be true; that he makes this affidavit on behalf of said defendant, because defendant is a foreign corporation.

WM. S. POND

Subscribed and sworn to before me this 26 day of June, 1895.

[Seal.]

C. E. REMSBERG,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Second Amended Answer. Filed July 1, 1895, in the U. S. Circuit Court. A. Reeves Agnew, Clerk.
By R. M. Hopkins, Deputy.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

No. 418.

Answer to First Affirmative Defense.

Comes now the above named plaintiff, and for an an-
swer to the first affirmative defense set forth in defend-
ant's Second Amended Answer says:

I.

She admits all the allegations of paragraph two, and
further alleges that at the time of making such applica-
tion said Guy C. Phinney paid to defendant the first pre-
mium on said policy, the receipt of which premium is
acknowledged in said policy.

II.

Plaintiff, replying to the allegations contained in para-
graph five of defendant's first affirmative defense, admits
that on the 21st day of October, 1890, the defendant trans-
mitted the policy of insurance mentioned in the complaint
to defendant's agent in San Francisco, and that there-
after, on the 28th day of October, 1890, the agent of de-

fendant at San Francisco transmitted the said policy of insurance to the agent of defendant in Seattle for delivery of the same to said Guy C. Phinney; she also admits that on the first day of November, 1890, the agent in Seattle delivered the said policy to said Guy C. Phinney.

Plaintiff denies each and every other allegation contained in paragraph five of defendant's first affirmative defense, and further alleges that the payment of the first premium was made to the defendant concurrent with and at the same time the application was made and delivered to defendant for said policy of insurance.

III.

Plaintiff denies each and every allegation contained in paragraph seven of said first affirmative defense not admitted and alleged to be true in plaintiff's complaint.

Reply to second affirmative defense:

For a reply to the allegations contained in the first paragraph of the second affirmative defense plaintiff denies each and every allegation therein contained.

For a first and further reply to the allegations contained in defendant's second affirmative defense, plaintiff alleges:

I.

That said policy of insurance mentioned in said second affirmative defense contained the following agreement and condition:

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof the only

conditions which shall be binding upon the holder of this policy are, that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890.

That said Guy C. Phinney died on the 12th day of September, 1893; that during all the time up to the time of his death, on the 12th day of September, 1893, and more than two years from and after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's second affirmative defense plaintiff says:

I.

That the said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney, and just prior to his death, he informed and declared to plaintiff that he was insured in defendant company in the sum of one hundred thousand dollars (\$100,000).

II.

That after his death and prior to the commencement of

this action plaintiff, fully believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and, in order that she might procure the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to the payment of said policy. That at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That thereupon, with full knowledge of all the facts, it denied liability to plaintiff on the said policy on one ground only, viz: that said contract was forfeited on the 24th day of September, 1894, for nonpayment of premium, and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff, knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at great expense to herself procured the services of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and thereupon did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of five hundred dollars (\$500).

Reply to third affirmative defense.

I.

Plaintiff denies each and every allegation contained in paragraph one of defendant's third affirmative defense not admitted or alleged to be true in plaintiff's complaint.

II.

Plaintiff says she has no knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph two of defendant's third affirmative defense.

III.

Plaintiff denies each and every allegation contained in paragraph three of defendant's third affirmative defense.

For a first and further reply to the allegations contained in defendant's third affirmative defense plaintiff alleges:

I.

That said policy of insurance mentioned in said second affirmative defense contained the following agreement and conditions:

Incontestability. It is hereby further promised and agreed that after two years from the date hereof the only conditions which shall be binding upon the holder of this policy are, that he shall pay the premiums at the time and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military services in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1896; that said Guy C. Phinney died on the 12th day of September,

1893; that during all the time up to the time of his death, on the 12th day of September, 1893, and more than two years after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's third affirmative defense plaintiff says:

I.

That said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney, and just prior to his death, he informed and declared to plaintiff that he was insured in defendant company in the sum of one hundred thousand dollars (\$100,000).

II.

That after his death and prior to the commencement of this action plaintiff, fully believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and in order that she might procure the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to the payment of said policy. That at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That thereupon, with full knowledge of all the facts, it denied liability to plaintiff on the said policy on one ground only, viz., that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium,

and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff, knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at great expense to herself procured the service of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and therefore did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of five hundred dollars (\$500).

Reply to fourth affirmative defense.

I.

Plaintiff denies each and every allegation contained in the fourth affirmative defense set forth in defendant's Second Amended Answer.

For a first and further reply to the allegations contained in the fourth affirmative defense plaintiff alleges:

I.

That said policy of insurance mentioned in said fourth affirmative defense contained the following agreement and condition:

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof the only conditions which shall be binding upon the holder of this policy are, that he shall pay the premiums at the times and place and in the manner stipulated in said policy, and that the requirements of the company as to age and mili-

tary or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

II.

That said policy of insurance on the life of Guy C. Phinney was issued on the 24th day of September, 1890. That said Guy C. Phinney died on the 12th day of September, 1893. That during all the time up to the time of his death on the 12th day of September, 1893, and more than two years after the 24th day of September, 1890, the date of the issuance of said policy, said Guy C. Phinney duly performed all the conditions of said contract by him to be performed.

For a further and second reply to the allegations in defendant's fourth affirmative defense plaintiff says:

I.

That said defendant ought not to be permitted to assert and maintain said plea for the following reasons:

That during the lifetime of said Guy C. Phinney, and just prior to his death, he informed and declared to plaintiff that he was insured in defendant company in the sum of one hundred thousand dollars (\$100,000).

II.

That after his death and prior to the commencement of this action plaintiff, fully believing that said policy was in full force, informed defendant company of the death of Guy C. Phinney, and, in order that she might procure

the insurance money, asked defendant company to instruct her what it desired to have done by her preliminary to the payment of said policy. That at said time defendant was fully informed of each and all matters and facts that it had when it made and filed its amended answer.

That thereupon, with full knowledge of all the facts, it denied liability to plaintiff on the said policy on one ground only, viz., that said contract was forfeited on the 24th day of September, 1891, for nonpayment of premium, and based its refusal to pay on no other or different ground.

III.

That thereupon plaintiff, knowing full well that said ground of defense was not well taken, and confidently believing that it was the only ground of defense that defendant had or would urge, at great expense to herself procured the services of attorneys to prosecute an action at law to recover the sum of money mentioned in said contract of insurance, and therefore did cause action to be commenced and a complaint to be filed to her cost and damage in the sum of five hundred dollars (\$500).

Wherefore, plaintiff prays that she may have judgment against said defendant as prayed for in her complaint.

S. WARBURTON,

Atty. for Plff.

State of Washington,)
County of Pierce.) ss.

Nellie Phinney, being first duly sworn, on oath deposes and says: That she is the plaintiff above named; that she

has read the foregoing reply, knows the contents thereof, and that the same are true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 12th day of July, 1895.

Notary Public in and for the State of Washington, residing at Tacoma.

Journal No. 2, page 67. Thursday, July 25, 1895.

NELLIE PHINNEY, Executrix, &c.,

vs.

MUTUAL LIFE INSURANCE CO. OF
NEW YORK.

Trial.

Now, on this 25th day of July, 1895, this cause comes on regularly for trial, in open Court, plaintiff being represented by S. Warburton, Esq., and A. F. Burleigh, Esq., and defendant represented by his counsel, Messrs. Strudwick & Peters, a jury being called, come and answer to their names, as follows:

A. Carlson,	T. M. Wheeler,	Gardner Kellogg,
Walter Creasey,	Frank Dean,	A. S. Reed,
E. J. Robinson,	Wm. Murray,	J. S. Upper and
John Alexander,	J. R. Van Alstine	L. D. Bruns.

twelve good and lawful men, duly empaneled and sworn, the trial proceeds by the examination of witnesses on the part of the plaintiff, at which time plaintiff having rested her case, the defendant moves for nonsuit, which motion is denied, to which ruling of the Court defendant excepts,

and its exception is allowed, and the cause proceeds by the examination of witnesses on behalf of defendant until the hour of adjournment, at which time, by consent of parties, it is ordered by the Court that this cause be, and the same is hereby, continued until to-morrow morning at ten o'clock, the 26th day of July, 1895, and, the Court having cautioned the jury, they are allowed to separate until that hour.

Journal No. 2, page 69. Friday, July 26, 1895.

NELLIE PHINNEY, Executrix

vs.

MUTUAL LIFE INSURANCE CO. OF
NEW YORK.

Trial (Continued).

And now the hour of ten o'clock A. M. having arrived, the plaintiff being represented by S. Warburton, Esq., and Andrew F. Burleigh, Esq., and defendant represented by its counsel, Messrs. Strudwick & Peters, the jury being called, come and answer to their names, all being present in their box, this cause proceeds by the examination of witnesses on behalf of defendant, and by examination of witnesses in rebuttal on behalf of plaintiff, and by the argument of counsel for plaintiff until the close thereof, at which time by consent of parties, it is ordered by the Court that this cause be, and the same is hereby continued until to-morrow morning at ten o'clock, the 27th day of July, 1895. And, the Court having cau-

tioned the jury, they are allowed to separate until that hour.

Journal No. 2, page 70.

Saturday, July 27, 1895.

NELLIE PHINNEY, Executrix,

vs.

MUTUAL LIFE INSURANCE CO. OF
NEW YORK.

}
}

Trial (Continued).

And now the hour of ten o'clock A. M. having arrived, the plaintiff being represented by S. Warburton, Esq., and A. F. Burleigh, Esq., and defendant represented by its counsel, Messrs. Strudwick & Peters, the jury being called, all answer to their names, all being present in their box, this cause proceeds by the argument of respective counsel until the close thereof.

Whereupon the jury are duly charged by the Court, and retire in charge of a sworn officer to deliberate.

And now on this same day the jury return into open Court, all being present in their box, when through their foreman they present the following verdict.

"We, the jury in the above-entitled cause, find for the plaintiff, and assess her damages at \$97,012.84.

"LOUIS D. BRUNS,

"Foreman."

Whereupon the jury are duly discharged from the cause.

*In the Circuit Court of the United States, Ninth Judicial
Circuit, District of Washington, Northern Division.*

NELLIE PHINNEY, Executrix, &c.

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK.

No. 418.

Verdict.

We, the jury in the above-entitled cause, find for the
plaintiff, and assess her damages at \$97,012.84.

LOUIS D. BRUNS,

Foreman.

[Endorsed]: Verdict filed July 27, 1895, in the U S.
Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins,
Deputy.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, Executrix of the
Last Will and Testament of GUY C.
PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

Notice of Motion for New Trial.

To the above-named plaintiff, Nellie Phinney, as execu-
trix of the last will and testament of Guy C. Phinney,

deceased, and to her attorneys, S. Warburton and Andrew F. Burleigh:

You, and all of you, will please take notice hereby that the above-named defendant intends to move and will move to vacate and set aside the verdict heretofore rendered herein, and for a new trial of the above-entitled action, upon the following grounds, to-wit:

1. Newly-discovered evidence material for this defendant, which it could not with reasonable diligence have discovered and produced at the trial.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Error in the assessment of the amount of recovery, the same being too large.

4. Insufficiency of the evidence to justify the verdict, and that the same is against law.

5. Error in law occurring at the trial and excepted to at the time by the defendant.

Said motion will be made upon affidavits to be hereafter filed, and on the minutes of the court, and the pleadings and proceedings on file in the office of the clerk of the above-entitled court, and upon all the proceedings had and done in the above-entitled action.

E. LYMAN SHORT,

STRUDWICK & PETERS,

STRATTON, LEWIS & GILMAN,

Solicitors for Defendant.

Receipt of copy of above is hereby acknowledged.

July 29th, 1895.

A. F. BURLEIGH,

S. Warburton,

Attys. for Plff.

[Endorsed]: Notice of intention to move for new trial.
Filed July 29, 1895, in the U. S. Circuit Court. A. Reeves
Ayres, Clerk. By R. M. Hopkins, Deputy.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of GUY
C. PHINNEY, Deceased.

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Motion for New Trial.

Comes now the defendant and hereby moves the Court to vacate and set aside the verdict of the jury in the above-entitled action, and for a new trial thereof, upon the following grounds, to-wit:

1. Newly-discovered evidence material for this defendant, which it could not with reasonable diligence have discovered and procured at the trial.
2. Excessive damages appearing to have been given under the influence of passion and prejudice.
3. Error in the assessment of the amount of recovery, the same being too large.
4. Insufficiency of the evidence to justify the verdict, and that the same is against law.
5. Error in law occurring at the trial and excepted to at the time by the defendant.

This motion is made upon affidavits to be hereafter filed in accordance with the rules of this Court, and on the minutes of the Court, and the pleadings and proceedings on file in the office of the clerk of the above-entitled Court, and upon all the proceedings had and done in the above-entitled action.

E. LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,

Solicitors for Defendant.

Receipt of copy of above is hereby acknowledged this 29th day of July, 1895.

A. F. BURLEIGH,
S. WARBURTON,

Attys. for Plff.

[Endorsed]: Motion for new trial filed July 29, 1895, in the U S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

No. 418.

Motion to Dismiss.

Comes now the defendant in the above-entitled action, and moves the Court as follows:

I.

That the judgment in the above-entitled action be arrested, and that the Court refuse to enter judgment on the verdict herein, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof or of the parties to said action.

II.

That the Court dismiss the above-entitled action, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof or of the parties to said action.

III.

That the Court will render judgment in favor of the defendant and against the plaintiff for the dismissal of this action, notwithstanding the verdict herein, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof or of the parties to said action.

This motion is based upon the files, records, and proceedings of this Court in the above-entitled cause, and upon all the testimony and evidence introduced upon the trial thereof.

E. L. SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for Defendant.

Recd. service of this motion this 10th day of Aug., 1895.

S. WARBURTON,

A. F. BURLEIGH,

Attorneys for Plff.

Motion filed Aug. 10, 1895, in the U. S. Circuit Court.

A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Administratrix
of the Last Will and Testament of
GUY C. PHINNEY, Deceased,
Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
Defendant.

Order Extending Time to File Bill of Exceptions.

This cause coming on duly and regularly to be heard upon the application of the defendant for an extension of time in which to appear, serve, and file a bill of exceptions herein to be used upon appeal, and the Court, being now fully advised in the premises, it is

Ordered, that the said defendant have until and including the 29th day of August, A. D. 1895, to prepare and file a bill of exceptions herein to be used upon appeal; and that the time of said defendant be and the same hereby is extended until and including the 29th day of August, A.

v. Nellie Phinney, Executrix, etc.

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D. 1895, in which to prepare, file, and serve such bill of exceptions.

Done at the June Term of the above-entitled Court in open Court this 30th day of July, A. D. 1895.

C. H. HANFORD,

Judge.

[Endorsed]: Order extending time for bill of exceptions. Filed July 30, 1895, in the U S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of GUY
C. PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

Order Extending Time to File Bill of Exceptions.

This cause coming on duly and regularly to be heard upon the application of the defendant for a further extension of time in which to prepare, serve, and file a bill of exceptions herein, to be used upon appeal, and the Court being now fully advised in the premises, it is

Ordered, that the said defendant have until and including the 16th day of September, A. D. 1895, to prepare and file a bill of exceptions herein to be used upon appeal; and

that the time of said defendant be and the same hereby is extended until and including the 16th day of September, A. D. 1895, in which to prepare, file, and serve such bill of exceptions.

Done at the June term of the above-entitled Court in open Court this 26th day of August, 1895.

C. H. HANFORD,

O.K. A. F. B.

Judge.

[Endorsed]: Order filed Aug. 26, 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix, &c.,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

Order Continuing Motion.

This cause coming on this day to be heard upon the motion of defendant to settle and allow its bill of exceptions herein, and upon the amendments to said bill proposed by said plaintiff and upon defendant's dissent to said amendments, it is ordered by the Court that the hearing of said motion be and the same is hereby continued until Thursday the 17th day of October, 1895, at 10 o'clock A. M.

Dated 16 Oct. 1895.

C. H. HANFORD,

Judge.

v. Nellie Phinney, Executrix, etc.

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[Endorsed]: Order filed Oct. 16, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the	} No. 418.
Last Will and Testament of GUY C.	
PHINNEY, Deceased,	
Plaintiff,	
vs.	
THE MUTUAL LIFE INSURANCE	} Defendant.
COMPANY OF NEW YORK,	

Stipulation and Order.

It is hereby stipulated by and between the parties to this action by their respective attorneys that said plaintiff may have ten days' additional time from September 19, 1895, in which to file amendments to the bill of exceptions prepared by defendant, and that an order granting said ten days may be signed by the Court.

S. Warburton & A. F. Burleigh,
Attorneys for Plaintiff.

E. L. Short,
Strudwick & Peters,
Stratton, Lewis & Gilman,
Attorneys for Defendant.

On reading and filing the above stipulation, it is ordered that the plaintiff's time for filing amendments to the bill of exceptions tendered and filed by the defendant may be

and the same is hereby, extended ten days from September 19, 1895.

C. H. HANFORD,

Judge.

[Endorsed]: Order filed Sept. 19, 1895. A. Reeves Ayres. Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, as Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

No. 418.

Notice of Dissent.

To the plaintiff above named, and to S. Warburton, Esquire, and A. F. Burleigh, her attorneys.

Comes now the Mutual Life Insurance Company of New York, the defendant above named, and gives notice to the plaintiff above named, and to S. Warburton, Esquire, and A. F. Burleigh, Esquire, her attorneys, that the said defendant dissents from the amendments, and each of them proposed by plaintiff to the said defendant's proposed bill of exceptions, served and filed herein, which said proposed amendments to said proposed bill of exceptions were served on said defendant on the 28th day of September, 1895. The said defendant further gives notice to said

attorneys, and to said plaintiff, that on Thursday, the 3rd day of October, 1895, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the courtroom of said Court in the city of Seattle, Washington, that the said defendant will present the proposed bill of exceptions and said proposed amendments to the judge of said Court for settlement.

Dated this 30th day of September, 1895.

E. L. SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,

Attorneys for Defendant.

Recd. copy of within notice this 30 day Sept. 1895:

A. F. BURLEIGH,

J. E. W.

[Endorsed]: Notice filed Oct. 1st, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By E. A. Colvin, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

No. 418.

Order of Continuance.

In the above-entitled action, the defendant having duly served and filed herein its proposed bill of exceptions, and

the plaintiff having duly served and filed herein her proposed amendments thereto, and the defendant having duly notified the plaintiff of its dissent to said amendments, and each of them, and that on this day it would present to the Court its proposed Bill of Exceptions and said proposed amendments for settlement, and said defendant having, on this day, duly presented said proposed Bill of Exceptions and said proposed amendments to the Court for settlement.

It is now, upon motion of the plaintiff, ordered by the Court that the hearing of said matter and the settlement of said Bill of Exceptions and said amendments thereto be, and the same is hereby, continued until the 16th day of October, 1895, at 10 o'clock A. M.

C. H. HANFORD,

Judge.

Dated this 3d day of October, 1895.

[Endorsed]: Order filed Oct. 3, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

General Order Book No. 3. Page 408.

Monday, October 7, 1895.

NELLIE PHINNEY, Executrix,

vs.

THE MUTUAL LIFE INSURANCE
CO. }

Order.

Now on this day it is ordered by the Court that the motion to dismiss this action for want of jurisdiction, heretofore, to-wit, on October 5, 1895, taken under advisement, be and the same is hereby denied.

NELLIE PHINNEY, Executrix,
vs.
THE MUTUAL LIFE INSURANCE
CO.

Order.

Now on this day it is ordered by the Court that the motion for a new trial heretofore, to-wit, on October 5th, 1895, taken under advisement, be and the same is hereby denied, to which ruling of the Court, in denying said motion, defendant excepts, and his exception is allowed.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, Executrix,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
Defendant.

No. 418.

Judgment.

The above cause having heretofore come on for trial on the 25th day of July, 1895, and the jury having been regularly empaneled, and the Court having heard the proofs and allegations of the parties, and Stanton Warburton, A. F. Burleigh, and Murray and Christian appearing for the plaintiff, and E. Lyman Short, Strudwick and Peters, and Stratton, Lewis and Gilman appearing for defendant, and the case having been submitted to the jury upon the instructions of the Court and allegations of the parties,

the jury having retired to consider the evidence, and having returned a verdict in open Court in favor of the plaintiff and against the defendant in the sum of ninety-seven thousand and twelve and 84-100 dollars (\$97,012.84), on the 27th day of July, 1895, and now, upon the application of plaintiff for judgment,

It is Ordered, Considered, and Adjudged that the plaintiff, Nellie Phinney, executrix of the estate of Guy C. Phinney, deceased, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the full sum of ninety-seven thousand and twelve and 84-100 dollars (\$97,012.94) in lawful money of the United States, together with interest at the rate of 7% per annum from the 27th day of July, 1895, together with her costs and disbursements in this action taxed at one hundred fifty-eight and 54-100 dollars (\$158.54).

To the rendering of the foregoing judgment, defendant duly excepts, and its exception is allowed by the Court.

Dated October 17, 1895.

C. H. HANFORD,

Judge.

[Endorsed]: Judgment filed October 17th, 1895. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the	} No. 418.
Last Will and Testament of GUY C	
PHINNEY, Deceased,	
Plaintiff,	
vs.	
THE MUTUAL LIFE INSURANCE	} Defendant.
COMPANY OF NEW YORK,	

Order that Proposed Bill of Exceptions be Amended.

In the above-entitled action, tried at June term, 1895, of the above-entitled court, the jury having returned a verdict in favor of plaintiff, on the 27 day of July, 1895, for the sum of ninety-seven thousand twelve and 84-100 (\$97,012.84) dollars, and the court having by consent of plaintiff, and at the request of the defendant, made an order extending the time of defendant to prepare, serve, and file its Bill of Exceptions herein until the 28th day of August, 1895, and before the expiration of said time, to-wit, on the 26th day of August, 1895, the court, by consent of plaintiff, and at the request of defendant, having further extended the time of said defendant to prepare, serve, and file its Bill of Exceptions herein, until the 16th day of September, 1895, and the said defendant having, on the 14th day of September, filed herein its proposed Bill of Exceptions and served a copy thereof upon the attorneys of plaintiff, and the Court having by consent of

the defendant, and at the request of plaintiff, made an order extending the time of said plaintiff to prepare, serve, and file her objections and amendments to said proposed Bill of Exceptions, until the 29th day of September, 1895, and said plaintiff having, on September 28th, 1895, served upon defendant, and filed herein her objections and amendments to said defendant's proposed Bill of Exceptions, and said defendant having on the 30th day of September, 1895, notified said plaintiff and her attorneys of its dissent to said proposed amendments, and to each of them, and that on the 3d day of October, 1895, at 10 o'clock A. M. or as soon thereafter as counsel could be heard, at the courtroom of said Court, in the city of Seattle, Washington, it would present the proposed Bill of Exceptions and said amendments to the Judge of said Court for settlement, and the defendants having, at the time and place aforesaid, presented said proposed Bill of Exceptions and said proposed amendments to said Judge for settlement, and the Court thereupon, upon motion of the plaintiff having made an order continuing the settlement of said proposed Bill of Exceptions of defendant, and said proposed amendments of plaintiff, and said defendants dissent to said amendments until the 16th day of October, 1895, at 10 o'clock A. M. and upon said 16th day of October, 1895, the said Court having made and entered its order continuing said matter until the 17th day of October, 1895, at the same hour, now upon this 17th day of October, 1895, the said matter coming on regularly to be heard, the plaintiff appearing by her attorneys, S. Warburton, Esq., and A. F. Burleigh, Esq., and the defendant appearing by its attorneys, E. Lyman Short, Strudwick

& Peters, and Stratton, Lewis & Gilman, and the same being heard, it is

Ordered by the Court that the said proposed Bill of Exceptions of defendant be amended as proposed by plaintiff, in the following particulars only, to-wit:

I.

Add at the end of Exception No. 20 (page 22), of said proposed Bill of Exceptions, the matter contained in pages 16½ to 20½ inclusive, of said proposed amendments, except that the dates of the proceedings set forth on page 20½ thereof are to be given, and add at the end of page 20 thereof "and plaintiff thereafter made a similar demand upon defendant."

II.

Strike out the last clause of Exception No. 21 (page 22 of said bill), of said bill, and insert the following in lieu thereof:

"The evidence relating to the matters referred to in said requested instruction, is set forth in Exception No. 20."

III.

Strike out the last clause of Exception No. 22 (page 23) of said proposed bill, and insert the foregoing in lieu thereof.

"The evidence relating to the matters referred to in said requested instruction, is set forth in Exception No. 20."

IV.

Add on page 31 of the proposed bill, the testimony of Mrs. Nellie Phinney, plaintiff, on redirect examination,

as found on pages 21 and 22 of proposed amendments filed herein.

V.

Strike out the last clause of exception No. 24 (page 34) of said proposed Bill of Exceptions, and insert the following in lieu thereof:

"The evidence relating to the matters referred to in said requested instruction, is set forth in exception No. 20."

VI.

Strike out the last clause of exception 25 (page 35) of said proposed Bill of Exceptions, and insert the following in lieu thereof:

"The evidence relating to the matters referred to in said requested instruction, is set forth in exception No. 20."

VII.

Add at the end of exception No. 26 (page 36), the following:

"The other evidence relating to the matters referred to in said requested instruction, is set forth in exception No. 20."

VIII.

Strike out the thirteenth and fourteenth lines of exception No. 29 (page 173) of said proposed Bill of Exceptions, the words: "and nothing in the pleadings upon which such evidence could be introduced," and add at the end of said exceptions the matter contained on pages 28 and 29 of said proposed amendments, being a portion of the deposition of W. J. Easton.

IX.

And on page 34 of proposed bill, 12th line, "Reference is also made to all the evidence set forth under the 20th exception."

It appearing to the Court that the said proposed Bill of Exceptions has been amended as herein directed, let the same be settled, allowed, and certified.

Done in open Court, at the June term, 1895.

Dated October 17th, 1895.

C. H. HANFORD,

Judge.

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed, and settled, and made a part of the record herein.

Done in open Court, at the June term, 1895, and dated this 17th day of October, 1895.

.....,

Judge.

[Endorsed]: Order filed Oct. 17, 1895, in the U S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

*In the Circuit Court of the United States for the District
of Washington, Northern Division.*

NELLIE PHINNEY, Executrix of the
Last Will and Testament of GUY C.
PHINNEY, Deceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

Objections to Defendant's Proposed Bill of Ex- ceptions.

Comes now the above-named plaintiff, Nellie Phinney, executrix, and objects to signing or allowing the defendant's proposed Bill of Exceptions as follows:

First.

Plaintiff objects to the Court's signing or allowing the first exceptions proposed by the defendant in its proposed bill of exceptions upon the following grounds:

1. That there was other competent, relevant, and material testimony given by the witness Stinson upon the question then under examination.

2. That certain parts of the testimony of said witness Stinson that was relevant, competent, and material to the question then under examination was suppressed and not set forth in the said exception, in this, that following the word "blank" in the third line of said exception on the

second page of said Bill of Exception the witness said "am not positive about it."

3. That said proposed exception is untrue in this, that in the tenth line of said exception the following language occurs: "I communicated to Mr. Phinney the result of my visit and application to Dr. Eagleson for a certificate of health."

Whereas, in truth and in fact, the witness did not so testify.

Second.

Plaintiff objects to the Court's signing or allowing the third exception in defendant's proposed Bill of Exceptions, on the ground that it does not contain all the evidence properly relating to the subject matter therein referred to.

Third.

Plaintiff objects to the Court signing or allowing the third exception set forth in defendant's proposed Bill of Exceptions upon the ground that said exception as proposed sets forth more than what in fact occurred at the time, in this that counsel for the defendant in their said proposed exception said that they objected to the question propounded to the witness Forbes, upon the ground that it was competent, irrelevant, and immaterial and not proper rebuttal. Whereas in fact they objected to the said question upon the ground only that the same was incompetent and not proper rebuttal.

Fourth.

Plaintiff objects to the Court signing or allowing the fourth proposed exception set forth on page six of the Bill of Exceptions proposed by defendant wherein it says

that, "the defendant duly excepted in writing to the refusal of the Court to give said instructions," on the ground that said defendant did not except to said instructions in writing. Plaintiff further objects to the Court granting said exception five on the ground that said instruction mentioned in said exception was 1 to 27 instructions requested by defendant. That said defendant did not separately except to the refusal of the Court to give any single instruction requested, and did not point out to the Court the ground or reason for its exception to the refusal of the Court to give said or any one of said 27 requests to instruct, but simply took one general exception to the refusal of the Court to give its 27 requested instructions in the following language only: "Defendant excepts to the refusal of the Court to give the instructions requested numbered from 1 to 27 inclusive." That no other exception was taken by defendant to said requested instruction in said exception mentioned than that above quoted.

Fifth.

Plaintiff objects to the Court allowing and signing defendant's proposed exception number five on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Sixth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number six on the same grounds and in the same manner set forth in plaintiff's objection to defendant's proposed Bill of Exception number four.

Seventh.

Plaintiff objects to the Court allowing or signing defendant's proposed Bill of Exception number seven on the same grounds and in the same manner in which plaintiff objects to defendant's proposed exception number four, and on the further ground that said exception does not speak the truth, wherein it says "it was established by positive evidence that Phinney did not tender any premium subsequent to the first at the date the same fell due."

Eighth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number eight on the same grounds and in the same language in which plaintiff objects as above set forth to defendant's proposed exception number four.

Ninth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number nine on the same grounds and in the same manner in which plaintiff objects as above set forth in defendant's proposed exception number four.

Tenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number ten on the same grounds and in the same language in which plaintiff objects as above set forth to defendant's proposed exception number four.

Eleventh.

Plaintiff objects to the Court allowing or signing de-

fendant's proposed exception number eleven on the same ground and in the same language in which plaintiff objects as above set forth to defendant's proposed exception number four.

Twelfth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twelve on the same grounds and in the same manner in which plaintiff objects as above set forth, to defendant's proposed exception number four, and also on the further ground that the statement in said exception that there was no evidence introduced of any tendering of premium after the year 1891 is not true.

Thirteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number thirteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Fourteenth.

Plaintiff objects to the Court signing or allowing defendant's proposed exception number fourteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Fifteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number fifteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Sixteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number sixteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number **four**.

Seventeenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number seventeen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number **four**.

Eighteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number eighteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number **four**.

Nineteenth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number nineteen on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number **four**.

Twentieth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number **four**, and also on the further ground that said proposed exception does not contain all the evidence relevant to the subject matter therein referred to.

Twenty-first.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-one on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-second.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-two on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-third.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-three on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-fourth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-four on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-fifth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-five on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-sixth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number twenty-six on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-seventh.

Plaintiff objects to the Court signing or allowing defendant's proposed exception number twenty-seven on the same grounds and in the same language in which plaintiff objects to defendant's proposed exception number four.

Twenty-eighth.

Plaintiff objects to the Court signing or allowing defendant's twenty-eighth proposed exception wherein it says: "That while the jury were still at the bar defendant duly excepted in writing and its exception was allowed by the Court," on the ground that no exception was taken to said instruction of the Court in writing.

Twenty-ninth.

Plaintiff objects to the Court allowing and signing defendant's proposed exception number twenty-nine wherein it states "nothing in the pleadings on which such evidence could be introduced," on the ground that no such exception was taken; also to that part of the twenty-ninth exception wherein it says "defendant duly excepted in writing," on the ground that no exception was taken to said instruction in writing. Plaintiff also objects to said defendant's exception on the ground that defendant did not take any exception at all applicable to that part

of the instruction of the Court quoted, and on the further ground that the twentieth and twenty-third exception does not state all the facts in said cause relating to a rescission of the contract, but on the contrary much evidence thereto is contained in defendant's proposed exception number twenty-seven.

Thirtieth.

Plaintiff objects to the Court allowing and signing defendant's proposed exception number thirty on the ground that defendant did not except to said instruction of the Court in writing, and on the further ground that all the evidence in relation to said instruction with reference to the rescission of the contract or surrender of the policy is not fully set forth in defendant's proposed exception number twenty and twenty-three, but a large part of it is contained in defendant's proposed exception number twenty-seven.

Thirty-first.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number thirty-one on the ground that said exception was not taken in writing as therein specified, and upon the further ground that said answer of the Court was in response to four questions asked by the jury of the Court to which he responded as in the proposed exceptions number thirty-one, thirty-two, thirty-three, and thirty-four, and after said questions were answered, defendant, by its attorney, excepted to said four answers by the Court, not alone and separate, but as follows: "While the jury was still at the bar the defendant excepted to the additional instructions given by the

Court to the jury, and to each of them as embodied in the questions and answers thereto, and requested that the instructions given be modified." Whereupon the Court said, "your exceptions are allowed, and if it is necessary to have a Bill of Exceptions show that these questions were answered by the Court and exceptions allowed to each one of them, and also that you asked to have a modification of the instructions by the substantial repetition of the instruction which the Court gave in regard to the abrogation of the contract by agreement between Stinson and Phinney. Your request for modification refused and exception allowed."

Thirty-second.

Plaintiff objects to the Court allowing and signing defendant's proposed exception number thirty-two on the same ground as specified in plaintiff's exception to exception number thirty-one.

Thirty-third.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number thirty-three on the same grounds mentioned in her exceptions to number thirty-one.

Thirty-fourth.

Plaintiff objects to the Court allowing or signing defendant's proposed exception number thirty-four on the same ground excepted to by her as specified and set forth in exception number thirty-one.

Plaintiff moves this Honorable Court to amend defendant's proposed Bill of Exceptions as follows, to-wit:

First.

Plaintiff asks the Court to amend defendant's proposed exception number one by inserting after the word "blank" in the third line on the second page of said proposed Bill of Exceptions, the following words, to-wit: "I am not positive about that," also to strike out from said exception the following words, "I communicated to Mr. Phinney the result of my visit and application to Dr. Eagleson for a certificate of health." Also asks that the following words be inserted: "Now in the case of Mr. Phinney, was such notice sent by you, that is, before the second year's premium matured?"

A. I presume it was. I sent them to all the policy holders.

Q. What did Phinney do in response to that notice, if anything?

A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company, and asked me if I could not take his notes for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company and they would take only cash. I think a few days before it was due, perhaps three or four days, I met him again and we had a similar conversation, and I told him about the same again, that I was unable to carry his notes, that I did not have the cash to put up to the company.

Q. Did he ever make payment of that premium to you?

A. Not to me, no sir.

Q. Who else in this State was authorized to receive and collect premiums? A. No one.

Q. Now did the time limited for the payment of premium—that expired without the payment of the premium I understand?

Objected to by plaintiff's counsel as calling for a conclusion.

The Court.—That is an unimportant question.

Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due and was unpaid with reference to this particular premium?

A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten days, I should say between one and two weeks after it was due, he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it, and he then told me that he was prepared to pay the premium.

Q. What did he ask you to do?

Objected to as leading by plaintiff's counsel.

Q. What, if anything, did he ask you to do?

Objection overruled; exception allowed.

A. He told me if I would bring the renewal receipt, or words to that effect, that he would pay the premium.

Q. State what occurred between you, what you said to him, and what he said to you.

A. I told him that I could not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank—I am not positive about that. He told me that he did not think that he

could pass for a certificate of health, from the fact that he had been rejected from the Equitable a few days before.

Q. Now, were any steps taken by you or by Mr. Phinney, to your knowledge, to ascertain whether or not he could obtain a certificate of health?

A. I saw Dr. Eagleson, the company's medical examiner, and requested him to examine Mr. Phinney and furnish a certificate of health. He told me that he had examined him recently for the Equitable and that they had refused the policy, and it would be useless to try to pass him for the reinstatement.

Q. You had the renewal receipt at the time in your possession?

A. Yes, sir.

Q. Now, you have said that you saw Mr. Phinney a few days before this policy matured, in 1891—the premiums you claim—and had a talk with him about it, and he said he was anxious for you to take his notes, and you informed him that you could not take his notes?

A. Yes, sir.

Q. When was the next time you saw him?

A. Well, I saw him so often that I could not fix any particular date within a few days.

Q. What did you tell him the next time you saw him?

A. In reply to his answer I told him—

Q. What was the conversation between you and Mr. Phinney the first time you saw him after the premium was due?

A. It was to this effect, that he asked me to take his notes in lieu of cash, and deliver him the company's receipt.

Q. What did you say?

A. I told him that I could not accept his notes, as I had to pay cash to the company and didn't have it.

Q. You told him that it would be necessary to get cash? A. Yes, sir.

Q. Before you delivered the receipts?

A. Yes, sir.

Q. When was the next time you saw him?

A. Within a week or ten days, I should think.

Q. What was the conversation then? A. It was about to the same effect as the first.

Q. Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in a general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. Now, just going back, you say finally he told you he was ready to pay the premium? A. Yes, sir.

Q. What did you tell him?

A. I told him that I could not accept the premium without a certificate of health.

Q. That the policy was forfeited?

A. That the policy was forfeited.

Q. Lapsed? A. Lapsed.

Q. And you could not accept it? Now, you wrote to the company that he had tendered the premium, didn't you? A. Yes, sir.

Q. You understood that was a good tender, didn't you? A. Yes, sir.

Defendant moves to strike out the answer of the witness as to what he understood.

Motion sustained.

Q. You understood Phinney was ready to pay—he said so? A. Yes, sir.

Q. You told him you could not accept it because he was in ill health? A. Yes, sir.

Q. And you say later on you went to the office and borrowed this policy? A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect; yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours?

A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir.

Second.

Plaintiff asks that defendant's proposed exception number two be amended by inserting at the end of said proposed exception the following words, to-wit: The balance of the evidence in having bearing on and relation to this exception is found in exception number and number 27.

Third.

Plaintiff asks defendant's proposed exception number three be amended by inserting in said exception at the beginning thereof, as follows, to-wit: A. B. Forbes said, being called as a witness on behalf of defendant to prove its issues, among other things, as follows:

A. I forwarded it to Mr. Stinson.

Q. What became of them, if you know?

A. Mr. Stinson's account came down, and it was unpaid, and not reported as paid, and we wrote up as usual

to have these receipts returned, and he returned that receipt to us with others.

Q. The Phinney receipt was returned?

A. The Phinney receipt was returned.

Q. What is done by the agent with the receipt if the premium is paid?

A. He gives it to the person who pays the premium.

Q. This receipt was returned to you?

A. This receipt was returned to me.

Q. And you returned it to New York?

A. I forwarded it to New York.

Recross-examination.

Q. (By Mr. Warburton.) Was the report of this premium being unpaid and the return of this receipt accompanied by a letter?

A. I think all our reports are with a statement that goes to each department.

Q. Have you got that letter here?

A. I have not. It is merely forwarded to us among premium receipts in a printed form and returned.

Q. Have you got the letter returning the premium receipts? A. It was returned with many others.

Defendant's counsel produced letter dated November 26.

Q. I show you this letter.

A. This is the letter from Mr. Stinson.

Q. This is Stinson's signature?

A. This is Stinson's signature.

(Paper marked Plaintiff's Exhibit K for identification.)

Q. What is this paper?

A. This is a communication from F. L. Stinson.

Said F. L. Stinson being called as a witness on its own behalf to prove its issues, on its own behalf, testified on direct examination as follows:

Q. You had the renewal receipt at that time in your possession? A. Yes, sir.

Q. What was done with that?

A. I returned it to Mr. Forbes.

Q. I will ask you whether or not Mr. Phinney at any time presented you the money for this purpose.

A. No, he did not.

On cross examination he testified as follows:

Q. Now, just going back, you say finally he told you he was ready to pay the premium. A. Yes, sir.

Q. What did you tell him?

A. I told him that I could not accept the premium without a certificate of health.

Q. That the policy was forfeited?

A. That the policy was forfeited.

Q. Lapsed? A. Lapsed.

Q. And you could not accept it? Now, you wrote the company that he had tendered the premium, didn't you?

A. Yes, sir.

Plaintiff further asks that said proposed exception number three be further amended by inserting after the word F. L. Stinson, at the bottom of page five of said proposed exception, the following.

Q. I show you plaintiff's Exhibit "L" for identification. A. Yes, sir. That is a letter I received from Mr. Stinson.

Plaintiff offers in evidence plaintiff's Exhibit "L" for identification.

Paper received without objection, and marked plaintiff's Exhibit "L."

EXHIBIT "L."

Seattle, Washington, Dec. 10th, 1891.

A. B. Forbes, Esq., Gen'l Agt.

Dear Sir: Your wire of the 9th inst. reading: "If tendered decline acceptance September premium No. 422198, Phinney," duly received.

This premium was tendered a few weeks ago but was refused by me, as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON.

Across the face appears:

"A. B. Forbes, Dec. 14, 1891, General Agent, S. F." [Indorsed]: "Plaintiff's Exhibit 'L.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did you, on or about the 9th day of December, 1891, on receipt of telegraphic instructions from the company, repeat the same to Mr. Stinson at Seattle, in these words: "If tendered decline acceptance of September premium 422198"?

A. I presume that is the record there, that is so. We repeated the telegram as we received it from New York.

Q. And you state, as I understand you, that you know nothing of any negotiations looking to the rescission or abandonment of the Phinney policy.

A. No, for this reason: we sent the premium receipt to New York as forfeited. It was notice to the company of all that. Their wires covered all the ground, and then the details had to be left with the agent here.

Q. That settled the matter so far as you are concerned?

A. That settled the matter so far as I was concerned. I will say here, it is not an uncommon thing to have people pay the first year's premium, and then come in and want to negotiate for time, or something I cannot give them, and they hand over their policies.

Q. Did you ever have any direct correspondence with Mr. Phinney on the subject of his insurance?

A. Never. I think not, sir. Mr. Stinson was my agent.

Q. All you know of this case then, you derived from reports and correspondence between yourself and Mr. Stinson?

A. Yes, sir, he was my agent and acted as such.

Fourth.

Plaintiff asks that defendant's proposed exception number four be amended as follows: That there be stricken out the following words and lines, to-wit:

"Thereupon, while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instructions, and its exception was allowed by the Court," and in lieu thereof the following be inserted, to-wit: That at the conclusion of the testimony defendant requested the Court in writing to give twenty-seven instructions, so prepared and so numbered by it. That said twenty-seven requests were all the requests for instructions made by defendant. That thereafter the Court charged the jury as in defendant's proposed exception number thirty set forth. That immediately thereafter, and while the jury were still at the

bar, defendant in taking and saving exceptions to the refusal of the Court to give said instructions so requested by it, used the following language only:

"Defendant excepts to the refusal of the Court to give the instructions requested numbered from one to twenty-seven inclusive."

That no other exception was taken to the Court's refusal to give any one or all of defendant's requests.

That said exception by said defendant was not in writing, but was dictated to the stenographer, who reported the proceedings of the trial. That no other or different exceptions to the refusal of the Court to give said, or any, instructions was taken by said defendant at that or any other time, or in any other manner. But the language quoted as having been dictated to the stenographer, to-wit: "Defendant excepted to the refusal of the Court to give the instructions requested, numbered from one to twenty-seven inclusive," was the sole, entire, and exclusive exception taken or noted by said defendant at any time, to the refusal of the Court to give said or any of its requests to charge the jury.

Fifth.

Plaintiff asks that defendant's proposed exception number five be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court, and that there be inserted in

lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Sixth.

Plaintiff asks that defendant's proposed exception number six be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Seventh.

Plaintiff asks that defendant's proposed exception number seven be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Plaintiff further asks that all the language following the above quoted in said exception be stricken out.

Eighth.

Plaintiff asks that defendant's proposed exception number eight be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar,

defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Ninth.

Plaintiff asks that defendant's proposed exception number nine be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Tenth.

Plaintiff asks that defendant's proposed exception number ten be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Eleventh.

Plaintiff asks that defendant's proposed exception number eleven be amended as follows: That there be stricken out of said exception the following words and lines,

to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Twelfth.

Plaintiff asks that defendant's proposed exception number twelve be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Plaintiff further asks that the remainder of said exception immediately following the word "quote" be stricken out.

Thirteenth.

Plaintiff asks that defendant's proposed exception number thirteen be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Fourteenth.

Plaintiff asks that defendant's proposed exception number fourteen be amended as follows: That there be stricken out of said exception the following words and lines, to wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Fifteenth.

Plaintiff asks that defendant's proposed exception number fifteen be amended as follows: That there be stricken out of said exception the following words and lines, to wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Sixteenth.

Plaintiff asks that defendant's proposed exception number sixteen be amended as follows: That there be stricken out of said exception the following words and lines, to wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted

in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Seventeenth.

Plaintiff asks that defendant's proposed exception number seventeen be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Eighteenth.

Plaintiff asks that defendant's proposed exception number eighteen be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Nineteenth.

Plaintiff asks that defendant's proposed exception number nineteen be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was

duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Twentieth.

Plaintiff asks that defendant's proposed exception number twenty be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing of the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

Plaintiff further asks that said exception number twenty be further amended by inserting at the end of it, immediately after the word "no," the following, to-wit:

Mr. Stinson, on cross-examination, testified as follows:

Q. Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in a general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. And you say later on you went to the office and borrowed this policy?

A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect, yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours? A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir.

Q. You know now that it was not true, don't you?

A. What?

Q. That the policy was not forfeited, but you thought it was forfeited, but as a matter of fact it was not forfeited at that time?

Defendant objects as calling for a conclusion of law.
Objection sustained. Exception allowed.

Q. Well, Phinney permitted you to take the policy?

A. Yes, sir.

Q. Did you ever return it to him? A. Not to my knowledge. I don't remember that I did.

Q. What became of this policy?

A. I don't know.

Q. You haven't got it now? A. No, sir.

Q. You say Phinney let you have this policy for canvassing purposes? A. Yes, sir.

Q. You asked him for it for that purpose?

A. Yes, sir.

Q. Now you would not care to have a dead policy for canvassing purposes, would you?

A. It would not make any difference whether it was dead or alive.

Q. You would not say that Phinney had a policy issued for a hundred thousand and it was such an expensive contract—

A. That is part I should not state if I was canvassing. I should show the contract.

Q. For the purpose of soliciting you would let them understand it was a live policy? A. Yes, sir.

Mr. Pond, witness in behalf of defendant, testified as follows:

"I think the first intimation I had of any claim from Mrs. Phinney, was the coming to my office of some clerk who told me that Mrs. Phinney had telephoned to know about her husband's insurance, and so, as soon as I came in, I looked up the record. That was the first knowledge I had that there was a policy, or had been a policy at all. I found out in the old book that there was a policy for one hundred thousand dollars taken in 1890, and lapsed after the payment of the first premium."

The deposition of Richard A. McCurdy, president of defendant company, was taken, and the same was introduced in evidence, and among the questions and interrogatories propounded to him were the following:

Q. What relation, if any, existed between F. L. Stinson of Seattle, Washington, and the said Mutual Life Insurance Company of New York, between 1890 and 1893?

A. A. B. Forbes was general agent for the Pacific Coast, including the State of Washington. No relation existed between this company and F. L. Stinson.

Q. If in answer to interrogatory four you say that F. L. Stinson, of Seattle, Washington, represented said Mutual Life Insurance Company of New York, as agent, state fully his powers and duties, in every particular. If his agency was created by writing, attach the original writing, or a copy, and properly identify it.

A. Mr. Stinson did not represent the company as its agent.

Q. What negotiations were had, if any, with Guy C.

Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance. State very fully everything said or done by, or on behalf of, the company, looking toward that end.

A. I do not know of any.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach a copy of same to this deposition, and properly identify it.

A. I know of nothing.

Q. Attach to your deposition every writing, of every kind or description, between the Mutual Life Insurance Company of New York and its agent, or between it and Guy C. Phinney, that in any manner related to, or is connected with, a waiver, abandonment, or rescission of the contract.

A. There are no writings in this office, except in Mr. Forbes' report of the premium unpaid, and the executive direction not to restore, which latter is as follows: Forfeited September 25th, 1891. Do not restore. 2nd Vice-President. 28th March, 1892.

The deposition of H. E. Duncan, corresponding secretary of the said Mutual Life Insurance Company of New York, was taken, and among the interrogatories propounded to him, and his answers thereto, are the following:

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by, or on behalf of, the company

looking toward that end. A. Mr. Forbes had charge of that matter, and it was attended to in the West.

Q. What party, or parties, were employed, or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach copy of same to this deposition and properly identify it. A. Mr. Forbes had charge of this matter, and it was attended to in the West.

Q. Attach to your deposition every writing, of every kind and description, between the Mutual Life Insurance Company of New York, and its agents, or between it and Guy C. Phinney, that in any manner related to, or is connected with, a waiver, abandonment, or rescission of the contract.

A. No such writings on file in this office. It was attended to in the West.

Q. If your answer to the preceding interrogatories discloses that the policy appeared on the books of the insurance company as a dead or terminated policy, state whether it was designated as a lapsed or forfeited policy.

A. I produce here a book of the company, and the entries thereon are as follows: Forfeited September 25th, 1891. Do not restore. 2nd Vice-President. 28 March, 1892.

Said A. B. Forbes, general agent of the Pacific Coast for defendant, being called as a witness by plaintiff, testified as follows:

Q. What negotiations were had, if any, with Guy C. Phinney looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully every

thing said and done by or on behalf of the company looking toward that end.

A. That was a matter that I left the detail of it to my agent here. I gave him the principal instructions, and the rest he had to perform.

Q. What instructions did you give him?

A. By telegram.

Q. Any other?

A. Perhaps a letter confirming the telegram.

Q. These documents have been put in evidence in this case?

A. I think so—I don't know whether they have or not.

Q. I will ask you to look at that copy attached to your deposition, Mr. Forbes, and state if that is your signature?

A. That is my signature there; this letter is a copy of the one received from Mr. Stinson.

Q. Please look at the document which I hand you, and state what that is. (Showing witness plaintiff's identification "K.")

A. That is a letter from Mr. Stinson returning the premiums unpaid.

Plaintiff offers in evidence plaintiff's Exhibit "K" for identification.

Objected to by defendant as incompetent and not proper rebuttal.

Objection overruled. Exception allowed.

EXHIBIT "K."

Seattle, Washington, Nov. 26, 1891.

A. B. Forbes, Esq., Gen'l Agt.

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts.

August.

114293 Curtis	No. 393675 Rogers
415957 Cushing	416309 Rice
418420 Calhoun	420062 Benson
441063 Raymore	441073 Patterson

September.

51342 Janney	No. 270465 McKay
287091 O'Connor	307195 Mohr
373328 Finch	373530 Heaton
375371 Buttner	412636 Anderson
418608 Monroe	422198 Phinney (Offered to pay but in ill health.)
	434207 Behrman

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipts asked for) will be reported in next acct.

Yours very truly,

F. L. STINSON.

[Endorsed]: "Plaintiff's Exhibit 'K.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. I show you plaintiff's Exhibit "L" for identification.

A. Yes, sir. That is a letter I received from Mr. Stinson.

Plaintiff offers in evidence plaintiff's Exhibit "L" for identification.

Paper received without objection, and marked plaintiff's Exhibit "L."

EXHIBIT "L."

Seattle, Washington, Dec. 10, 1891.

A. B. Forbes, Esq., Gen'l Agt.

Dear Sir: Your wire of the 9th inst. reading, "If tendered decline acceptance September premium No. 422198, Phinney," duly received.

This premium was tendered a few weeks ago, but was refused by me as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON.

Across the face appears:

"A. B. Forbes, Dec. 14, 1891, General Agent, S. F."

[Endorsed]: "Plaintiff's Exhibit 'L.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did you on or about the 9th day of December, 1891, on receipt of telegraphic instructions from the company, repeat the same to Mr. Stinson at Seattle in these words: "If tendered decline acceptance of September premium No. 422198"?

A. I presume that is the record, that is so. We repeated the telegram as we received it from New York.

Q. And you state, as I understand you, that you know nothing of any negotiations looking to the rescission or abandonment of the Phinney policy?

A. No; for this reason: We sent the premium receipt to New York as forfeited. It was notice to the company of all that. Their wires covered all the ground, and then the details had to be left to the agent here.

Q. That settled the matter as far as you are concerned?

A. That settled the matter as far as I was concerned. I will say here, it is not an uncommon thing to have people pay the first year's premium and then come in and want to negotiate for time, or something I cannot give them, and they hand over their policies.

The following exhibits were introduced in evidence, without objection:

EXHIBIT "D."

New York, July 19th, 1894.

Mrs. Nellie Phinney, 1201 James Street, Seattle, Washington.

Madam: Acknowledging receipt of yours of the 12th inst., we beg to advise you that policy 422198 on the life of the late Guy C. Phinney was issued September 24th, 1890, and was forfeited September, 1891, for nonpayment of premium. This policy therefore has no value. If you desire any further information regarding this insurance we respectfully suggest that you should communicate with our general agent, Mr. A. B. Forbes, San Francisco, Cal., through whose agency this policy was issued.

Yours very truly,

H. E. DUNCAN, Jr.,

[Endorsed.]

Corresponding Sec.

EXHIBIT "E."

Seattle, Wash., July 24th, 1891.

Mrs. Guy C. Phinney, City.

Dear Madam: We beg to advise you that but one annual premium was paid under your husband's policy 422198 for \$100,000, and therefore the policy lapsed Sept.

1891. Our senior, Mr. Pond, is in Portland, and upon his return will probably take the first opportunity to call upon you and explain this information in detail.

Yours very truly,
WM. S. POND, Manager.

[Endorsed.]

Per Geo. R. Carter.

That after the commencement of this action, and after defendant had appeared and demurred, defendant by its attorney demanded that plaintiff produce this said policy that it might inspect the same.

That immediately prior to the trial of said cause, plaintiff sued out a commission for the taking of the depositions of H. E. Duncan, Richard McCurdy, and W. J. Easton, all officers of defendant corporation, also for the taking of the depositions of A. B. Forbes and Stanley Forbes. Said A. B. Forbes, from September 24th, 1890, to the commencement of the suit was general manager of said defendant company for the Pacific Coast, including Washington, and Stanley Forbes during all of said time being his cashier. That thereupon said plaintiff filed her interrogatories to be propounded to each of said witnesses, and served a copy thereof on defendant's attorneys. That among the interrogatories to be propounded to said Richard A. McCurdy, also said W. J. Easton, also to said H. E. Duncan, also to said A. B. Forbes, and also to said Stanley Forbes, were among others the following interrogatories:

"Q. State fully what form of premium notices was used, if any, by the Mutual Life Insurance Company of New York, to notify the parties insured in said company, that premiums would become due on policies issued

through Pacific Coast agencies on parties residing in the State of Washington, during the year 1890, 1891, 1892, and 1893. If more than one form was used state fully what each contained.

"Q. Attach to this deposition copies of each and every form of notices used as described in the preceding interrogatory, during the time therein mentioned."

That thereafter defendant's attorneys filed written exceptions thereto, on the ground that the same were incompetent, irrelevant, and immaterial.

That thereafter plaintiff and defendant each appeared before the Hon. C. H. Hanford, Judge of said Court, for the purpose of settling said interrogatories, and defendant insisted upon each of said objections and exception to said interrogatories.

That thereupon plaintiff, by her attorneys, stated that she desired and insisted that said interrogatories should be answered. That she might need them for the purpose of rebuttal in case defendant should claim that it had sent or mailed any notice to Guy C. Phinney or claim any benefit of any notice claimed to have been sent to said Phinney. That the answers of said witnesses together with other evidence that plaintiff would have at hand, would enable plaintiff to prove that the notice required by the statute of New York had never been mailed to said Phinney. That plaintiff desired to prove the custom of said defendant as to the mailing of notices to its policy holders, under any and all circumstances. That such evidence would disclose the fact that no notice was mailed at all to Guy C. Phinney. Whereupon said defendant by its attorneys then stated and declared to plaintiff and said

Court that said defendant was not claiming to have mailed any notice to said Phinney. That it had not alleged in its answer that it had mailed any notice to said Phinney, and was not claiming and would not claim any benefit from the mailing or sending any notice to said Phinney. Whereupon relying upon the statements of said counsel, said Court sustained defendant's objection and exceptions to said interrogatories and denied to plaintiff the right of having said interrogatories answered.

Twenty-first.

Plaintiff asks that defendant's proposed exception number twenty-one be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception; that there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested instruction are set forth in exception number twenty as amended.

Twenty-second.

Plaintiff asks that defendant's proposed exception number twenty-two be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the

bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception. That there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested instruction are set forth in exception number twenty as amended.

Twenty-third.

Plaintiff asks that defendant's proposed exception number twenty-three be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: Thereupon, while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court, and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception.

That there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested instruction are set forth in exception number twenty as amended.

That there also be inserted the following, to-wit: On redirect examination Nellie Phinney testified as follows:

Q. (By *Mr. Warburton*.) You say that Mr. Phinney never told you this policy was forfeited? A. No.

Q. Did he ever tell you it was alive? A. Yes.

Q. How many times did he tell you it was alive?

A. I could not tell you just how many times, but a number of times.

Q. How long prior to his death did he mention this policy as being one of his policies of insurance that was in force?

A. Not more than two weeks.

Q. Did he give you any directions as to the use of the insurance you should collect.

A. Yes, sir.

Q. Mention this policy among them?

A. Yes, sir.

Q. You say you did have several conversations with Mr. Burleigh about this?

A. Well, I don't know several—I know I have talked with Mr. Burleigh.

Q. Did you talk to others about it?

A. No.

Q. State the condition of your health, Mrs. Phinney, immediately after the death of your husband.

Objected to by counsel for defendant as immaterial.

Objection overruled; exception allowed.

Q. For the first nine months after Mr. Phinney's death.

A. The first year after Mr. Phinney's death I was seriously ill.

Q. Were you able to attend to business at all during that time?

A. No, I was not.

Q. These policies were collected by your agent, were they not?

A. Yes, sir.

Q. The business matters were all turned over to other parties?

A. All done through other parties.

Q. Who prepared that letter, Mrs. Phinney, that you mailed to New York?

A. Objected to by counsel for defendant as immaterial.

Twenty-fourth.

Plaintiff asks that defendant's proposed exception number twenty-four be amended as follows: That there be stricken out of said exception the following words and lines, to-wit:

"Thereupon while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception number four. That there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested exception are set forth in exception number twenty as amended.

Twenty-fifth.

Plaintiff asks that defendant's proposed exception number twenty-five be amended as follows: That there be stricken out of said exception the following words and lines, to-wit:

"Thereupon, while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception. That there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested in-

struction are set forth in exception number twenty amended.

Twenty-sixth.

Plaintiff asks that defendant's proposed exception number twenty-six be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court," and that there be inserted in lieu thereof the same language and words that plaintiff asks be inserted in said fourth exception; that there also be inserted the following, to-wit: That evidence having relation to the matters referred to in said requested instruction are set forth in exception number twenty as amended.

Twenty-seventh.

Plaintiff asks that defendant's proposed exception number twenty-seven be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was allowed by the Court," and in lieu thereof the following be inserted, to-wit: That at the conclusion of the testimony defendant requested the Court in writing to give twenty-seven instructions, so prepared and so numbered by it; that said twenty-seven requests were all the requests for instructions made by defendant; that thereafter the Court charged the jury as in defendant's proposed exception number thirty set forth; that immedi-

ately thereafter, and while the jury were still at the bar, defendant, in taking and saving exception to the refusal of the Court to give said instruction so requested by it, used the following language only:

"Defendant excepts to the refusal of the Court to give the instructions requested, numbered from one to twenty-seven inclusive."

That no other exception was taken to the Court's refusal to give any one or all of defendant's requests.

That said exception by said defendant was not in writing, but was directed to the stenographer, who reported the proceedings of the trial. That no other or different exception to the refusal of the Court to give said or any instructions was taken by said defendant at that or any other time, or in any other manner. But the language quoted as having been dictated to the stenographer, to-wit: "Defendant excepted to the refusal of the Court to give the instructions requested numbered from one to twenty-seven inclusive," was the sole, entire, and exclusive exception taken or noted by said defendant, at any time, to the refusal of the Court to give said or any of its requests to charge the jury.

Twenty eighth.

Plaintiff asks that defendant's proposed exception number twenty-eight be amended as follows: That there be stricken out of said exception the following words and lines, to-wit:

"To which in said instruction of the Court, subsequent to the conclusion of its charge, and while the jury was still at the bar, defendant duly excepted in writing and

exception was duly allowed by the Court," and in lieu thereof the following be inserted, to-wit. That at the conclusion of the instructions of the Court to the jury, plaintiff excepted orally to the charge of the Court, and the same was noted by the stenographer. That the instructions of the Court are set forth in full in exception number thirty. That the defendant thereupon orally excepted to the charge of the Court as follows, to-wit:

The defendant excepts to the instructions of the Court to the jury wherein the Court stated the effect of the statute of the State of New York upon the policy sued upon in this action, which said instruction began with the words, in substance as follows: "The law of this contract is controlled by the statute of New York" and down to that portion of the Court's charge beginning "several defenses," that a strict compliance with that statute was necessary and in substance that it could not be waived. That will identify the instructions so that it can be covered. And to the whole of the instruction covering the application of the New York statute, and the rule which would apply to the policy under that statute and the effect of that statute.

We desire further to except to that portion of your Honor's charge wherein you stated that if this agreement for the abandonment or surrender Mr. Phinney's policy was entered into between the company's representatives and Mr. Phinney uninfluenced or without any false representations or deceit practiced upon said Phinney, that the contract would be put to an end, upon the ground that there is no evidence. We desire to except to that portion of the instruction which refers to false representations or

deceit on the ground that there is no evidence of any false representations or deceit.

Also that portion of your Honor's charge in which you stated in order to constitute abandonment of a contract there must be a mutual agreement.

Also to that portion of your Honor's charge wherein you state that in order to render this abandonment of the contract claimed by the defendant effectual that the jury must find that the company, relying upon that, acted.

The Court. —Exceptions allowed.

That no other or different exception or exceptions were made to the Court's charge to the jury, or any part thereof, than as above set forth.

Twenty-ninth.

Plaintiff asks that defendant's proposed exception number twenty-nine be amended as follows, to-wit: That there be stricken out of said proposed exception the following words and language, to-wit: "To which said instruction the Court subsequent to the conclusion of its charge, and while the jury was still at the bar, defendant duly excepted in writing," on the ground that there was no evidence showing or tending to show any fraud, false representations, or deceit, and that there be inserted in lieu thereof the words and lines requested to be inserted in exception number twenty-eight.

Plaintiff also asks that the words "and nothing in the pleadings upon which such evidence could be introduced" be stricken out, as no such exception was taken.

Plaintiff further asks that the following words be

stricken out: "All the evidence in this cause relating to a rescission of the contract, and surrender of the policy by the assured was as is stated in the twentieth and twenty-third exception herein, and that there be inserted in lieu thereof the following:

F. L. Stinson being duly sworn, testified, among other things, as follows:

Q. Now, in the case of Mr. Phinney, was such notice sent by you, that is, before the second years' premium matured?

A. I presume it was. I sent them to all the policy holders.

Q. What did Phinney do in response to that notice, if anything?

A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company, and asked me if I could not take his notes for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company, and they would take only cash. I think a few days before it was due, perhaps three or four days, I met him again and we had a similar conversation and I told him about the same again, that I was unable to carry his notes; that I did not have the cash to put up to the company.

Q. Did he ever make payment of that premium to you? A. Not to me; no, sir.

Q. Who else in this State was authorized to receive and collect premiums? A. *No, Sir.*

Q. How did the time limited for the payment of premium—that expired without the payment of the premium I understand?

Objected to by plaintiff's counsel as calling for a conclusion.

The Court.—That is an unimportant question.

Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due, and was unpaid, with reference to this particular premium?

A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten days I should say—between one and two weeks after it was due, he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it and he then told me that he was prepared to pay the premium.

Q. What did he ask you to do?

Objected to as leading by plaintiff's counsel.

Q. What, if anything, did he ask you to do?

Objection overruled. Exception allowed.

A. He told me if I would bring the renewal receipt, or words to that effect, that he would pay the premium.

Q. State what occurred between you, what you said to him, and what he said to you.

A. I told him that I could not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank—I am not positive about that. He told me that he did not think that he could pass for a certificate of health, from the fact that he had been rejected by the Equitable a few days before.

Q. Now, were any steps taken by you or by Mr. Phinney, to your knowledge, to ascertain whether or not he could obtain a certificate of health?

A. I saw Dr. Eagleson, the company's medical exami-

ner, and requested him to examine Mr. Phinney and furnish a certificate of health. He told me that he had examined him recently for the Equitable, and that they had refused the policy, and it would be useless to try to pass him for the reinstatement.

Q. You had the renewal receipt at the time in your possession? A. Yes, sir.

Q. Now, you have said that you saw Mr. Phinney a few days before this policy matured, in 1891—the premiums you claim—and had a talk with him about it, and he said he was anxious for you to take his notes, and you informed him that you could not take his notes?

A. Yes, sir.

Q. When was the next time you saw him?

A. Well, I saw him so often that I could not fix any particular date, within a few days.

Q. What did you tell him the next time you saw him?

A. In reply to his answer I told him—

Q. What was the conversation between you and Mr. Phinney the first time you saw him after the premium was due?

A. It was to this effect, that he asked me to take his notes in lieu of cash, and deliver him the company's receipt.

Q. What did you say?

A. I told him that I could not accept his notes, as I had to pay cash to the company, and I didn't have it.

Q. You told him that it would be necessary to get cash? A. Yes, sir.

Q. Before you delivered the receipts?

A. Yes, sir.

Q. When was the next time you saw him?

A. Within a week or ten days, I should think.

Q. What was the conversation then?

A. It was about to the same effect as the first.

Mr. Stinson on cross-examination testified as follows:

Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in a general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. And you say later on you went to the office and borrowed this policy? A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect?

A. Words to that effect; yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours? A. Yes, sir.

Q. Now you didn't mean to tell him an untruth?

A. No, sir.

Q. You know now that it was not true, don't you?

A. What?

Q. That the policy was not forfeited, but you thought it was forfeited, but as a matter of fact it was not forfeited at that time?

Defendant objects as calling for a conclusion of law.

Objection sustained. Exception allowed.

Q. Well, Phinney permitted you to take the policy?

A. Yes, sir.

Q. Did you ever return it to him?

A. Not to my knowledge. I don't remember that I did.

Q. What became of this policy?

A. I don't know.

Q. You haven't got it now? A. No, sir.

Q. You say Phinney let you have this policy for canvassing purposes? A. Yes, sir.

Q. You asked him for it for that purpose?

A. Yes, sir.

Q. Now, you would not care to have a dead policy for canvassing purposes, would you?

A. It would not make any difference whether it was dead or alive.

Q. You would not want to say that Phinney had a policy issued for one hundred thousand, and it was such an expensive contract—

A. That is part I should not state if I was canvassing. I should show the contract.

Q. For the purpose of soliciting you would let them understand it was a live policy? A. Yes, sir.

That the following exhibits were introduced in evidence.

EXHIBIT "K."

Seattle, Washington, Nov. 26th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

114293 Curtis

No. 393675 Rogers

415957 Cushing

416309 Rice

418420 Calhoun

420062 Benson

441063 Raymore

441073 Patterson

v. Nellie Phinney, Executrix, etc.

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September.

51342 Janney	No. 270465 McKay
287091 O'Connor	307195 Mohr
373928 Finch	387530 Heaton
375371 Buttner	412636 Anderson
413608 Monroe	422198 Phinney

*Offered to pay but
in ill-health.*

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipts asked for will be reported in next account.)

Yours very truly,

F. L. STINSON."

EXHIBIT "L."

Seattle, Washington, Dec. 10th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: Your wire of the 9th inst. reading, "If tendered, decline acceptance September premium, No. 422198, Phinney," duly received.

This premium was tendered a few weeks ago, but was refused by me as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON.

Across the back appears:

"A. B. Forbes, Dec. 14, 1891, General Agent, S. F."

The deposition of W. J. Easton, secretary of the company, was introduced in evidence, and among others the following interrogatories and answers thereof were read in evidence:

After premium was unpaid, Mr. Stark made these reports to Mr. Forbes:

No. 422198. Amount \$100,000.

Name GUY C. PHINNEY.

Residence, Seattle, Washington.

Business, Pres. City National Bank.

Date of Investigation, Jan. 22, 1892.

Remarks.

Financially all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

[Signed]

STARK.

No. 422198. Amount \$100,000.

Name GUY C. PHINNEY.

Residence, Seattle, Washington.

Business, Pres. City National Bank.

Date of investigation. Forfeited.

Remarks.

All right fin. but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

[Signed]

STARK.

Awaiting particulars.

Q. In what manner did the policy of Guy C. Phinney, number 422198 appear on the books of the company on the 12th day of September, 1893, as to whether it was a live, dead, or terminated policy?

A. This book of the company which I produce here has in it the following entries: Forfeited September 25th, 1891. Do not restore. 2nd Vice-President. 28th March, 1892.

That the balance of the evidence relating to the rescission of the contract and surrender of the policy as claimed by defendant was, as is stated, in the twentieth and twenty-third exception, together with plaintiff's proposed amendments thereto, and also exception number twenty-seven.

Thirty.

Plaintiff asks that defendant's proposed exception number thirty be amended as follows: "To which said instruction was given at the conclusion of the trial, and while the jury were still at the bar, defendant duly excepted in writing, and its exception was allowed by the Court." That the foregoing be stricken out of said exception, and that there be inserted in lieu thereof the words and language plaintiff asks be inserted in exception twenty-eight. That the following also be stricken out, to-wit: "All the evidence in this cause relating to obtaining a rescission of the contract, and the alleged surrender of the policy, by defendant, was as is stated in the twentieth and twenty-third exception, together with plaintiff's amendment thereto, and also in the twenty-seventh exception.

Thirty-first.

Plaintiff asks that defendant's proposed exception number thirty-one be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, and while the jury was still at the bar, defendant duly excepted in writing to the instruction given by the Court as embodied in said question, and its exception was duly allowed by the Court," and that

there be inserted in lieu thereof the following: The above answer was one of four answers to four questions asked by the jury, the questions and answers being set forth in defendant's exceptions number thirty-one, thirty-two, thirty-three, and thirty-four. That at the conclusion of the Court's answers to said questions the defendant orally interposed the following objection:

Defendant excepts to the additional instruction given by the Court to the jury, and to each of them, and requests that the instruction just given be modified. Whereupon the Court said:

"Your exception is allowed, and it is necessary to have a bill of exceptions show that these questions were received and answered by the Court and exceptions allowed to each one of them, and also that you asked to have a modification of instructions, by substantial repetition of the instructions which the Court gave in regard to the abrogation of the contract by agreement between Stinson and Phinney. Your request for the modification refused and exception allowed."

Thirty-second.

Plaintiff asks that defendant's proposed exception number thirty-two be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, and while the jury was still at the bar, defendant duly excepted to the instruction of the Court to the jury, embodied in said question and answer, and its exception was duly allowed by the Court," and plaintiff asks that there be inserted in lieu thereof the

same words and matters that plaintiff asks be inserted in exception thirty.

Thirty-third.

Plaintiff asks that defendant's proposed exception number thirty-three be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted to the instruction of the Court to the jury, embodied in said question and answer, and its exception was duly allowed by the Court," and plaintiff asks that there be inserted in lieu thereof the same words and matters that plaintiff asks be inserted in exception number thirty.

Thirty-fourth.

Plaintiff asks that defendant's proposed exception number thirty-four be amended as follows: That there be stricken out of said exception the following words and lines, to-wit: "Thereupon, while the jury was still at the bar, defendant duly excepted to the instruction of the Court to the jury embodied in said question and answer, and its exception was duly allowed by the Court," and plaintiff asks that there be inserted in lieu thereof the same words and matters that plaintiff asks be inserted in exception number thirty.

Plaintiff asks that defendant's proposed Bill of Exceptions be amended as follows: That immediately following defendant's proposed exception number thirty-four, there be inserted and added to said proposed Bill of Exceptions the following, to-wit:

"After the conclusion of the evidence and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instructions, to-wit:

Instruction requested by defendant number twenty-four.

"You are instructed that the written appointment of F. L. Stinson made by the defendant, on the 16th day of April, 1891, and filed in the office of the secretary of state of the State of Washington, pursuant to the statute of the State of Washington a certified copy of such appointment has been introduced, must be accepted by you as sufficient proof that the said Fred L. Stinson was, at the date of said written appointment, the general agent of the State of Washington for the defendant, which agency would be presumed to continue until some sufficient revocation of the powers conferred by said written appointment were shown; and there is no evidence of the revocation of said powers, prior to the death of Guy C. Phinney."

Instruction requested by the defendant number twenty-six.

"If you believe from the evidence in this case that Guy C. Phinney, the assured, treated and negotiated with F. L. Stinson as the agent of the company as one having full authority concerning the matter then in hand between said Phinney and said company you are instructed that the plaintiff executrix would have no right as against the principal of said Stinson, the defendant here, to dispute or

deny the authority of said agent and would be estopped to deny the claim."

Instruction requested by the defendant, number twenty-seven.

"If the jury believe from the evidence that A. B. Forbes of San Francisco was the general agent and agent of defendant for the Pacific Coast, including Washington, with authority from defendant to appoint State agents, then you are instructed that if the said Forbes appointed said Stinson pursuant to his (Forbes') authority, from the company, State agent for Washington of defendant, such appointment by said Forbes would constitute said Stinson agent for defendant."

That said proposed instructions were three out of twenty-seven proposed by the defendant, and the exception thereto, together with the balance of the twenty-seven requested instructions by the defendant, was excepted to in the same language as set forth in defendant's proposed exception number four as amended by plaintiff.

And now, in furtherance of justice, and that right may be done, the plaintiff presents the foregoing objections and amendments to defendant's proposed Bill of Exceptions, and prays that the said objections and said amendments may be allowed, and the same be inserted within defendant's proposed Bill of Exceptions.

A. F. BURLEIGH,

Attorney for Plaintiff.

STANTON WARBURTON,

Attorney for Plaintiff.

Service of the above and foregoing objections and proposed amendments to defendant's Bill of Exceptions and receipt of copy thereof, on this 28th day of September, 1895, is hereby admitted.

STRATTON, LEWIS & GILMAN,

STRUDWICK & PETERS,

Attorneys for Defendant.

Filed Sept. 28, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

**NELLIE PHINNEY, as Executrix of
the last Will and Testament of GUY
C. PHINNEY, Deceased,**

Plaintiff,

vs.

**THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,**

Defendant.

No. 418.

Bill of Exceptions as Settled and Allowed.

Be it remembered that this cause came on duly and regularly for trial the 25th day of July, 1895, before the Honorable C. H. Hanford, judge of the above-entitled Court; the plaintiff appearing by her attorneys, S. Warburton, Esq., Murry & Christian, and A. F. Burleigh, Esq., and the defendant appearing by its attorney, E. Lyman Short, Esq., Messrs. Strudwick & Peters, and Messrs. Stratton, Lewis & Gilman. A jury having been duly em-

paneled and sworn to try the cause, the following proceedings were had, and the following exceptions duly taken:

First Exception.

F. L. Stinson was called by the defendant to sustain the issues in its behalf, and after being first duly sworn, among other things, testified in substance as follows:

"In the year 1891 I was the general agent of the defendant for the State of Washington. From four to six weeks after the 24th day of September, 1891, Mr. Phinney came to me, and told me he was prepared to pay the premium on the policy for 1891, and if I would bring him a renewal receipt he would pay the premium. I told him that I could not accept the premium at that time unless he furnished a certificate of health, and I think I furnished him the blank. He told me that he did not think he could pass for a certificate of health from the fact that he had been rejected by the Equitable a few days before. I saw Dr. Eagleson, the company's medical examiner, and requested him to examine Mr. Phinney, and furnish a certificate of health. He told me that he had examined him recently for the Equitable, and that they had refused the policy, and it would be useless to try to pass him for the reinstatement. I communicated to Mr. Phinney the result of my visit and application to Dr. Eagleson for a certificate of health."

Dr. J. B. Eagleson was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

"I am a physician and surgeon practicing at Seattle. In September, October, November, and December, 1891, I

was the medical examiner of the Mutual Life Insurance Company of New York, and also of the Equitable Life Insurance Company. I recollect examining Guy C. Phinney for insurance in the Equitable Life in September, 1891—I think it was September 30th."

Q. What, if any, application subsequent to that date was made to you for a certificate of health on the part of Guy C. Phinney for the Mutual Life?

Objected to by plaintiff unless it be shown that application was made by Phinney.

Counsel for defendant states that he wishes to show that the result was communicated to Phinney.

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial.

Said objection was sustained by the Court. Thereupon defendant duly excepted in writing and his exception was duly allowed by the Court.

Q. I will ask this question, stating to the Court that Mr. Stinson testified without objection that he went to Dr. Eagleson for a certificate of health for Mr. Phinney. How long after the 30th of September, when the examination was made for the Equitable Life, was it that Mr. Stinson came to you asking for a certificate of health for Phinney?

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial.

Said objection was sustained by the Court. Thereupon defendant, by its counsel, duly excepted in writing, and its exception was duly allowed by the Court.

Q. I will ask you whether or not about the middle of November, 1891, Mr. Stinson made an application to you

as medical examiner of the Mutual Life Insurance Company, the defendant in this action, for a certificate of health for Guy C. Phinney?

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial.

Said objection was sustained by the Court. Thereupon defendant, by its counsel, duly excepted in writing, and its exception was allowed by the Court.

Second Exception.

It was established by the evidence in this case that A. B. Forbes of San Francisco, California, was, during the years 1890, 1891 and 1892, the general agent for the defendant for the Pacific Coast States and Territories, including the State of Washington. That F. L. Stinson was, during said period, the agent of said defendant for the State of Washington and Oregon, having general charge and management for its business in said States.

Said A. B. Forbes was called as a witness in rebuttal in behalf of the plaintiff, and, having been duly sworn, testified as follows:

Q. I want to ask you two or three questions in reference to this case. First, I want to inquire if you were instructed or notified by the Mutual Life Insurance Company of New York not to accept the second premium on the Phinney policy, number 422198, after September 24, 1891?

Said question was objected to by defendant as incompetent, irrelevant, and immaterial, and not proper rebuttal.

Said objection was overruled by the Court, whereupon defendant, by its counsel duly excepted in writing, and its exception was duly allowed by the Court.

A. I was.

Q. Did you give like notice and instructions to F. L. Stinson, or forward to him any such instructions and notice given by the company with reference to the Guy C. Phinney policy?

Said question was objected to by the defendant as incompetent, irrelevant, and immaterial, and not proper rebuttal.

Said objection was overruled by the Court, whereupon defendant, by its counsel duly accepted in writing, and said exception was duly allowed by the Court.

A. I did.

Third Exception.

The said A. B. Forbes, upon further examination, testified as follows:

Q. Please look at the document which I hand you, and state what it is.

(Showing witness plaintiff's Exhibit "K" for identification.)

A. That is a letter from Mr. Stinson reporting premiums unpaid.

(Plaintiff here offers in evidence plaintiff's Exhibit "K" for identification.)

Objected to by defendant as incompetent, irrelevant, and immaterial, and not proper rebuttal.

Said objection was overruled by the Court, whereupon defendant duly excepted in writing, and his exception

was allowed by the Court, and said Exhibit "K" was received in evidence and was as follows:

'EXHIBIT 'K.'

Seattle, Washington, Nov. 26th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

No. 114293 Curtis	No. 393675 Rogers
415957 Cushing	416309 Rice
418420 Calhoun	420062 Benson
441063 Raymore	441073 Patterson

September.

51342 Janney	270465 McKay
287091 O'Connor	307195 Mohr
373328 Finch	373530 Heaton
375371 Buttner	412636 Anderson
418608 Monroe	422198 Phinney <small>(Offered to pay but in ill-health.)</small>
	434207 Behrman

Several of the above, also quite a number of those previously sent will be reinstated. Those not included (if receipts asked for will be reported in next acct.)

Yours very truly,

F. L. STINSON."

Fourth Exception.

Upon the conclusion of the testimony and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instructions to the jury:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof, that a premium of thirty-seven hundred and seventy (\$3,770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney died on September 12th, 1893; the evidence in this cause establishes the fact that the assured, Guy C. Phinney did not pay to the defendant, at the time mentioned in said contract, the premium falling due on September 24, 1891, and by reason of said nonpayment of premium by said assured, the said policy became and was void and of no effect after said date; and you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give. Thereupon, while the jury was still at the bar, the defendant duly excepted in writing, to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

It was established by positive, certain, and direct evidence in the case that Guy C. Phinney, did not pay any more than the first premium on the policy in suit, and there was nothing in the case to rebut that positive evidence of sufficient weight to justify the question of pay-

ment of the premiums of 1891 and 1892 being submitted to the jury.

Fifth Exception.

Upon the conclusion of the testimony and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instructions to the jury:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy (\$3,770) dollars should be paid to Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of said contract until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated, was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney died on September 12th, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney did not pay to the defendant, at the time mentioned in said contract, the premium falling due on September 24th, 1892, and by reason of said nonpayment of premium by said assured, the said policy became of no effect after said date; and you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give. Thereupon, while the jury was still at the bar, the defend-

ant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

It was established by positive, certain, and direct evidence in the case that Guy C. Phinney did not pay any more than the first premium on the policy in suit, and there was nothing in the case to rebut that positive evidence, of sufficient weight to justify the question of payment of the premiums of 1891 and 1892 being submitted to the jury.

Seventh Exception.

Upon the conclusion of the testimony and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof, that a premium of thirty-seven hundred and seventy (\$3,770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of this contract, until premium for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated, was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney died on September 12, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney, did not pay, nor

tender to defendant, at the time stipulated in said contract, the premium falling due on September 24, 1892, and by reason of said nonpayment or tender of premium by said assured, the said policy became and was void and of no effect after said date; and you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give. Thereupon, while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

It was established by positive, certain, and direct evidence in the case that said Guy C. Phinney did not pay any premiums other than his first premium upon said policy, and that he did not tender any subsequent premium: at or prior to date the same fell due, and there was nothing to rebut such positive evidence of sufficient weight to justify the question of payment or order at or before the time said premium became due being submitted to the jury.

Eighth Exception.

After the conclusion of the evidence and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof, that a premium of thirty-seven hundred and

seventy (\$3,770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893; if you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract, the premium falling due September 24, 1891, such nonpayment by the said assured, would render the said policy void and of no effect after said date. And if you find the facts so to be, you will find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

The evidence relating to the nonpayment of premiums by the assured was as is stated in the fourth exception.

Ninth Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the

Court in writing to give the following instruction to the jury.

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy (\$3,770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence, and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in the contract the premium falling due September 24, 1892, you are instructed that said nonpayment by the said assured would render the said policy void and of no effect after said date. And if you find the facts so to be, you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and defendant's exception was duly allowed by the Court.

The evidence of nonpayment of premium by the assured was as is stated in the fourth exception.

Tenth Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that it appears from the face of said policy that it contained the following clause as one of the provisions and requirements and conditions thereof: 'Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived.'

"And you are instructed that said waiver by the assured, Guy C. Phinney, of the sending of any notice required by any statute was effectual and binding upon said assured, and is effectual and binding upon the plaintiff in this action; and that by reason of said waiver it was not incumbent upon the defendant, in order to declare or claim a forfeiture of said policy by reason of the nonpayment of premiums according to the terms of said policy, to send to the assured the notice mentioned and required by the laws of the State of New York for the year 1875. Chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321, which is relied upon by the plaintiff even if said statute were otherwise applicable to this contract.

"And you are further instructed, by reason of said waiver, the failure to send statutory notice did not oper-

ate to prevent the forfeiture of said policy pursuant to its terms, by reason of the nonpayment of premiums falling due thereon, and if you find from the evidence that Guy C. Phinney, the assured, did not pay the defendant the premium falling due upon said policy according to its terms September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find he did not pay the premium falling due thereon September 24, 1892."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and defendant's exception was duly allowed by the Court.

There was positive, certain, and direct testimony that the premiums falling due September 24th, 1891, and September 24th, 1892, on the policy in suit were not paid, and no evidence to the contrary.

Eleventh Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that it appears from the application, policy, and pleadings in this action that Guy C. Phinney, the assured, was a resident of the State of Washington, and at all times therein mentioned, and that the application for said policy was signed by said Guy C. Phinney in said State; that said policy, with the applica-

tion, which constituted a part thereof, completely set forth the contract between defendant and the assured.

"You are further instructed that said application provides that said policy 'shall not take effect until the first premium shall have been paid, and the policy shall have been delivered.'

"You are further instructed that it appears from said pleadings that the first premium upon said policy was paid in Seattle, Washington, and that said policy was, by defendant, delivered to assured at the same place.

"You are therefore further instructed that the policy sued upon in this action never became a completed contract, binding upon either party to it, until the delivery of the policy and the payment of the first premium in the State of Washington; and that said policy is, therefore, a Washington contract, and is governed by the laws of the State of Washington, and not by the laws of the State of New York. And that the law of New York, hereinbefore referred to, and relied upon by the plaintiff, is not applicable to and does not govern this contract. And if you find from the evidence that Guy C. Phinney, the assured, did not pay the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find he did not pay the premium falling due thereon September 24, 1892."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give

said instruction, and defendant's exception was duly allowed by the Court.

There was positive, certain, and direct testimony that the premiums falling due September 24th, 1891, and September 24th, 1892, on the policy in suit were not paid, and no evidence to the contrary.

Twelfth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death on September 12th, 1893.

"And you are further instructed that the plaintiff, executrix, was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court. There was positive, direct,

and certain testimony that the premiums on the policies in suit maturing September 24, 1891, and September 24, 1892, were not paid, and there was nothing to rebut that positive evidence of sufficient weight to justify the question of the payment of said premiums being submitted to the jury. There was no evidence introduced of any payment or tender of said premium, or either of them, by plaintiff to the defendant prior to the beginning of this action.

Thirteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death on September 12, 1893.

"And you are further instructed that the plaintiff, executrix, was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant."

The evidence as to payment and tender of said premiums was as is stated in the twelfth exception.

Fourteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"If you find from the evidence in this case that the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death on September 12th, 1893, then you are instructed that the plaintiff executrix is not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past due premium. If you find from the evidence that said premium was still unpaid, and that the amount thereof had never been tendered by the plaintiff to the defendant prior to the beginning of this action, your verdict should be for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

The evidence as to payment and tender of said premium was as is stated in the twelfth exception.

Fifteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to

the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"If you find from the evidence in this case that the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death on September 12, 1893, then you are instructed that the plaintiff, executrix, was not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past due premium. If you find from the evidence that said premium was still unpaid, and the amount thereof has never been tendered by the plaintiff to the defendant, prior to the beginning of this action, your verdict should be for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court. The evidence as to payment and tender of said premium was as is stated in the twelfth exception.

Sixteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that no waiver of the payment of the due premium or of its tender can avail the plaintiff,

unless such waiver, with all the facts alleged to constitute the same, are alleged in the complaint of the plaintiff or in her reply, and there being no such facts pleaded, no evidence on such points can be considered by you, notwithstanding the statute of New York of 1876 and 1877, relied upon by the plaintiff, and there being no testimony of such fact, you are instructed to find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court. The evidence as to payment and tender of said premium was as is stated in the twelfth exception.

Seventeenth Exception

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"The plaintiff in her complaint in this action alleges performance of the conditions of the policy sued on on her part and on the part of Guy C. Phinney. I charge you that under said contract one of the conditions to be performed by the said Guy C. Phinney was the payment of the premiums falling due on September 24, 1891, and September 24, 1892 ;and the plaintiff cannot recover in this action without establishing the allegations of her complaint, performance under such contract, namely, the pay-

ment of said premiums, and if you find from the evidence in this action that the premium of 1891 or the premium of 1892 was not paid by Guy C. Phinney, then your verdict must be for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

There was positive, certain, and direct evidence that the premiums of 1891 and 1892 on the policy in suit were not paid, and no evidence to rebut this positive, certain, and direct evidence.

Eighteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are instructed that the said statute of New York for 1876 and 1877 is local in its nature, and applies only to assured or their assigns residing in the State of New York; and that the said statute has no application to and does not govern the contract sued upon in this action; and if you further find from the evidence that the assured, Guy C. Phinney, failed to pay either the premium maturing September 24, 1891, or the premium maturing September 24, 1892, then you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give, where-

upon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give the Court.

said instruction, and said exception was duly allowed.

There was positive, certain, and direct evidence that the premiums of 1891 and 1892 on the policy in suit were not paid, and no evidence to rebut this positive, certain, and direct evidence.

Nineteenth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

"You are further instructed that said law of New York, hereinbefore referred to, and which is relied upon by plaintiff, in so far as it is attempted to be construed to impose the duty of sending notices to residents outside the State of New York, in connection with policies which became completed contracts, either within or without the State of New York, and in so far as it may be construed not to permit any waiver of sending such notices by contract between the parties thereto, is invalid, for the reason that it is violative of and repugnant to the constitution of the United States, because said statute, so construed, would be a denial to this defendant by the State of New York and Washington of the equal protection of their laws, and would be a deprivation by said States of the property of defendant without due process of law, and would be a regulation of commerce in the several States,

and would be interfering with the sovereignty of the State of Washington, and would affect property and business without the jurisdiction of the State of New York; and because said law, so construed, violates the Constitution of the United States, in that it is a law impairing the obligation of contracts, and, under the rights, titles and privileges, and immunities which belong to the defendant under the Constitution of the United States, it was not obliged to send notices to the assured under this policy.

“And if you find from the evidence that Guy C. Phinney, the assured, did not pay to the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the case if you find that he did not pay the premium falling due upon the policy September 24, 1892.

Which said instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

There was positive, certain, and direct evidence that the premiums of 1891 and 1892, on the policy in suit were not paid, and no evidence to rebut this positive, certain, and direct evidence.

Twentieth Exception.

After the conclusion of the evidence and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the

Court, in writing, to give the following instruction to the jury:

"Notwithstanding the requirements of the statute of New York, that notices in a particular form and at a time prescribed shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited, yet if the jury finds from the evidence that the defendant sent a notice to the said Guy C. Phinney, although such notice was not in the form, nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said said premium, came to the representative of the company and requested further time in which to pay said premium, and such extension of time was refused by said representative, and the said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and that said premium was not paid, nor tendered by, or on behalf of, said Phinney, at its maturity, then you are instructed that such conduct on the part of said Phinney, and of the representative of the company, would constitute a recognition by said Phinney of the notice sent as a valid notice; and a waiver on the part of said Phinney of the notices in the form, and at the same time required by the New York statute, if the same were otherwise applicable. If you so find the facts to be, you must find a verdict for the defendant."

Which said instruction the court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted, in writing, to the refusal of the Court to

give said instruction, and said exception was duly allowed by the Court.

E. L. Stinson, a witness on behalf of the defendant, having been duly sworn, testified among other things, as follows:

G. Now, what was the course of business of the company at that time in reference to the collection of renewals upon policies, that is, second and subsequent—that is, the premiums of second and subsequent years?

A. I received a monthly statement from Mr. Forbes inclosing the renewal receipts due that month. They were forwarded to me, and by me collected, and the proceeds remitted to Mr. Forbes.

Q. What was done with the renewal receipts when the premium was collected?

A. They were given to the assured.

Q. And in case of their not being collected?

A. Returned to Mr. Forbes.

Q. Now, the second premium of Mr. Phinney became due September 24, 1891. State whether or not you sent out notices to the different policy holders?

A. Yes, sir.

Q. Was any other notice sent out?

A. Mr. Forbes sent a notice from San Francisco as well.

Q. Now, on the case of Mr. Phinney, was such notice sent by you, that is, before the second year's premium matured?

A. I presume it was. I sent them to all the policy holders.

Q. What did Phinney do in response to that notice, if anything?

A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company, and asked me if I could not take his note for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company, and they would take only cash. I think a few days before it was due, perhaps three or four days, I met him again, and we had a similar conversation, and I told him about the same again, that I was unable to carry his notes; that I did not have the cash to put up to the company.

Q. Did he ever make any payment of that premium to you? A. Not to me; no, sir.

Q. Who else in the State was authorized to receive and collect premiums. A. No one.

Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due and was unpaid with reference to this particular premium?

A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten days, I should say—between one and two weeks after it was due, he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it, and then he told me that he was prepared to pay the premium.

Q. What, if anything, did he ask you to do?

A. He told me if I would bring the renewal receipt, or words to that effect, that he would pay the premium.

Q. State what occurred between you and what you said to him and what he said to you.

A. I told him that I could not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank—I am not positive about that. He told me that he did not think he could pass for a certificate of health, from the fact that he had been rejected by the Equitable a few days before.

Q. Now were any steps taken by you or by Mr. Phinney, to your knowledge, to ascertain whether or not he could obtain a certificate of health?

A. I saw Dr. Eagleson, the company's medical examiner, and requested him to examine Mr. Phinney and furnish a certificate of health. He told me that he had examined him recently for the Equitable, and that they had refused the policy, and it would be useless to try to pass him for the reinstatement.

Q. You had the renewal receipt at that time in your possession?

A. Yes, sir.

Q. What was done with that?

A. I returned it to Mr. Forbes.

Q. I will ask you whether or not Mr. Phinney at any time presented you the money for this premium?

A. No, he did not.

Q. Well, was there any further transaction between you and Mr. Phinney with reference to this insurance or the policy?

A. We had, I think, several conversations after that in a general way. I think it was in December, possibly January, following, I was in Mr. Phinney's office and we got to talking about insurance, and the subject of this policy came up and I requested him to let me have the policy to use for canvassing purposes, and he stated the same having lapsed he had no further use for it, and I could take it if I wanted it.

Q. Did you take it?

A. I took it at that time, as near as I can remember.

Q. Do you remember whether or not you did use it for canvassing purposes?

A. I do not remember that particular policy; I had several in large amounts—I don't know whether I used it or not.

Q. I will ask you whether or not it was customary in your business where policies have been lapsed to get the policy? A. Well, I did it in large policies?

Q. You were still the agent of the company? I think you said until the latter part of 1893? A. Yes, sir.

Q. State whether or not the premium of 1892 was paid or tendered. A. Not to me.

Q. Now, until you left the service of the company in the latter part of 1893, I will ask you whether or not any claim was made by Mrs. Phinney to you regarding that policy? A. Not to me.

Q. I will ask you whether or not she or anybody else representing her ever made any inquiry regarding it.

A. Not to me.

Q. After you received this policy, this conversation between yourself and Mr. Phinney, I will ask you whether or not Mr. Phinney ever made any claim that this policy was not lapsed. A. No.

Mr. Stinson, on cross-examination, testified as follows:

Q. Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in a general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. And you say later on you went to the office and borrowed this policy. A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect.

A. Words to that effect; yes, sir.

Q. And you were well acquainted with Phinney?

A. Yes, sir.

Q. And a good friend of yours? A. Yes, sir.

Q. Now, you didn't mean to tell him an untruth?

A. No, sir.

Q. You know now that it was not true, don't you?

A. What?

Q. That the policy was not forfeited, but you thought it was forfeited, but as a matter of fact it was not forfeited at that time?

Defendant objects as calling for a conclusion of law.

Objection sustained. Exception allowed.

Q. Well, Phinney permitted you to take the policy?

A. Yes, sir.

Q. Did you ever return it to him?

A. Not to my knowledge. I don't remember that I did.

Q. What became of this policy?

A. I don't know.

Q. You have n't got it now? A. No.

Q. You say Phinney let you have this policy for canvassing purposes? A. Yes, sir.

Q. You asked him for it for that purpose?

A. Yes, sir.

Q. Now, you would not care to have a dead policy for canvassing purposes, would you?

A. It would not make any difference whether it was dead or alive.

Q. You would not want to say that Phinney has a policy issued for a hundred thousand and it was such an expensive contract.

A. That is the part I should not state if I was canvassing. I should show the contract.

Q. For the purpose of soliciting you would let them understand it was alive policy? A. Yes, sir.

Mr. POND, witness in behalf of defendant, testified as follows:

"I think the first intimation I had of any claim from Mrs. Phinney, was the coming in my office of some clerk, who told me that Mrs. Phinney had telephoned to know about her husband's insurance. And so as soon as I came in I looked up the record. That was about the first knowledge I had that there was a policy, or had been a policy at all. I found out in the old book that there was a policy for one hundred thousand dollars taken in 1890, and lapsed after the payment of the first premium."

The deposition of Richard A. McCurdy, president of the defendant company, was taken, and the same was introduced in evidence, and among the questions and interrogatories propounded to him were the following:

Q. What relation, if any, existed between F. L. Stinson, of Seattle, Washington, and the said Mutual Life Insurance Company of New York, between 1890 and 1893?

A. A. B. Forbes was general agent for the Pacific Coast, including the State of Washington. No relation existed between this company and F. L. Stinson.

Q. If in answer to interrogatory four you say that F. L. Stinson, of Seattle, Washington, represented said Mutual Life Insurance Company of New York, as agent, state fully his powers and duties in every particular. If his agency was created by writing, attach the original writing, or a copy, and properly identify it.

A. Mr. Stinson did not represent the company as its agent.

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by or on behalf of the company, looking toward that end.

A. I do not know of any.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach a copy of same to this deposition and properly identify it.

A. I know of nothing.

Q. Attach to your deposition every writing of every kind or description between the Mutual Life Insurance Company of New York and its agents, or between it and Guy C. Phinney, that in any manner related to or is connected with a waiver, abandonment, or rescission of the contract.

A. There are no writings in this office, excepting Mr. Forbes' report of the premium unpaid and the executive direction not to restore, which latter is as follows: Forfeited September 24th, 1891. Do not restore. 2nd Vice-President. 28th March, 1892.

The deposition of H. E. DUNCAN, corresponding secretary of the said Mutual Life Insurance Company of New York, was taken, and among the interrogatories propounded to him, and his answers thereto, are the following:

Q. What negotiations were had, if any, with Guy C. Phinney looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by or on behalf of the company, looking toward that end.

A. Mr. Forbes had charge of that matter, and it was attended to in the West.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission on the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach a copy of same to this deposition and properly identify it.

A. Mr. Forbes has charge of this matter, and it was attended to in the West.

Q. Attach to your deposition every writing, of every kind and description, between the Mutual Life Insurance Company of New York and its agents, or between it and Guy C. Phinney, that in any maner related to or is connected with a waiver, abandonment, or rescission of the contract?

A. No such writings on file in this office. It was attended to in the West.

Q. If your answer to the preceding interrogatories discloses that the policy appeared on the books of the insurance company as a dead, or terminated policy, state whether it was designated as a lapsed or forfeited policy.

A. I produce here a book of the company, and the entries thereon are as follows: Forfeited September 25th. Do not restore. 2nd Vice-President. 28th March, 1892.

Said A. B. FORBES, general agent of the Pacific Coast for defendant, being called as a witness by plaintiff, testified as follows:

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said and done by or on behalf of the company looking toward that end?

A. That was a matter that I left the detail of it to my agent here. I gave him the principal instructions, and the rest he had to perform.

Q. What instructions did you give him?

A. By telegram.

Q. Any other?

A. Perhaps a letter confirming the telegram.

Q. These documents have been put in evidence in this case?

A. I think so—I don't know whether they have or not.

Q. I will ask you to look at that copy attached to your deposition, Mr. Forbes, and state if that is your signature.

A. That is my signature there; this letter is a copy of the one received from Mr. Stinson.

Q. Please look at the document which I hand you, and state what that is? (Showing witness plaintiff's identification K.)

A. That is a letter from Mr. Stinson returning the premiums unpaid.

Plaintiff offers in evidence plaintiff's Exhibit "K," for identification.

Objected to by defendant as incompetent and not proper rebuttal.

Objection overruled. Exception allowed.

EXHIBIT "K."

Seattle, Washington, Nov. 26, 1891.

A. B. Forbes, Esq., Gen'l Agt.

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

114293 Curtis	No. 393675 Rogers
415957 Cushing	416309 Rice
418420 Calhoun	420062 Benson
441063 Raymore	441073 Patterson

September.

51342 Janney	270465 McKay
287091 O'Connor	307195 Mohr
373328 Finch	373520 Heaton
375371 Buttner	412636 Anderson
418608 Monroe	422198 Phinney
434207 Behrman	

[Offered to
pay burial
ill-health

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipt asked for) will be reported in next acct.

Yours very truly,

F. L. STINSON.

[Endorsed]: "Plaintiff's Exhibit 'K.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk.
By R. M. Hopkins, Deputy."

Q. I show you Plaintiff's Exhibit "L" for identification.

A. Yes, sir. That is a letter I received from Mr. Stinson.

Plaintiff offers in evidence Plaintiff's Exhibit "L" for identification.

Paper received without objection, and marked Plaintiff's Exhibit "L."

EXHIBIT "L."

"Seattle, Washington, Dec. 10, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: Your wire of the 9th inst. reading, 'If tendered decline acceptance September premium No. 422198, Phinney,' duly received.

This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON."

Across the face appears:

"A. B. Forbes, Dec. 14, 1891, General Agent, S. F."

[Endorsed]: "Plaintiff's Exhibit 'L' filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did you, on or about the 9th day of December, 1891, on receipt of telegraphic instructions from the company, repeat the same to Mr. Stinson at Seattle in these words: "If tendered decline acceptance of September premium 422198?"

A. I presume that is the record there; that is so. We repeated the telegram as we received it from New York.

Q. And you state, as I understand you, that you know

nothing of any negotiations looking to the rescission or abandonment of the Phinney policy?

A. No; for this reason, we sent the premium receipt to New York as forfeited. It was notice to the company of all that. Their wires covered all the ground, and then the details had to be left with the agent here.

Q. That settled the matter so far as you were concerned?

A. That settled the matter as far as I was concerned. I will say here, it is not an uncommon thing to have people pay the first year's premium and then come in and want to negotiate for time or something I cannot give them, and they hand over their policies.

The following exhibits were introduced in evidence without objection:

EXHIBIT "D."

New York, July 19th, 1894.

Mrs. Nellie Phinney, 1201 James street, Seattle, Washington.

Madam: Acknowledging receipt of yours of the 12th inst., we beg to advise you that policy 422198 on the life of the late Guy C. Phinney was issued September 24, 1890, and was forfeited September, 1891, for nonpayment of premium. This policy, therefore, has no value. If you desire any further information regarding this insurance, we respectfully suggest that you should communicate

with our general agent, Mr. A. B. Forbes, San Francisco, Cal., through whose agency this policy was issued.

Yours very truly,

H. E. DUNCAN, Jr.,

Corresponding Sec.

[Endorsed.]

EXHIBIT "E."

Seattle, Wash., July 24, 1894.

Mrs. Guy C. Phinney, City,

Dear Madam: We beg to advise you that but one annual premium was paid under your husband's policy 422198 for \$100,000, and therefore the policy lapsed in Sept., 1891. Our senior, Mr. Pond, is in Portland, and upon his return will probably take the first opportunity to call upon you and explain this information in detail.

Yours very truly,

WM. S. POND, Manager,

Per Geo. R. Carter.

[Endorsed.]

After the commencement of this action, and after defendant had appeared and demurred, defendant, by its attorneys, demanded that plaintiff produce this said policy, that it might inspect the same, and plaintiff thereafter made a like demand upon defendant.

On April 23, 1895, plaintiff sued out a commission for the taking of the depositions of H. E. Duncan, Richard A. McCurdy, and W. J. Easton, all officers of the defendant corporation; also for the taking of the depositions of A. B. Forbes and Stanley Forbes. Said A. B. Forbes, from September 24th, 1890, to the commencement of

the suit, was general manager of said defendant company for the Pacific Coast, including Washington, and Stanley Forbes during all of said times being its cashier. That thereupon said plaintiff filed her interrogatories to be propounded to each of said witnesses, and served a copy thereof on defendant's attorneys. That among the interrogatories to be propounded to said Richard A. McCurdy, also said W. J. Easton, also to H. E. Duncan, also to said A. B. Forbes, and also to said Stanley Forbes, were, among others, the following interrogatories:

Q. State fully what form of premium notices were used, if any, by the Mutual Life Insurance Company of New York, to notify the parties insured in said company that premiums would become due on policies issued through Pacific Coast agencies, on parties residing in the State of Washington, during the years 1890, 1891, 1892, and 1893. If more than one form was used, state fully what each contained.

Q. Attach to this deposition copies of each and every form of notices used as described in the preceding interrogatory during the time therein mentioned.

On May 3 defendant's attorneys filed written exceptions thereto on the ground that the same were incompetent, irrelevant, and immaterial.

On May 21, 1895, plaintiff and defendant each appeared before the Honorable C. H. Hanford, Judge of said Court, for the purpose of settling said interrogatories, and defendant insisted upon each of said objections and exceptions to said interrogatories.

On May 21, plaintiff, by her attorneys, stated that she

desired and insisted that said interrogatories should be answered. That she might need them for the purpose of rebuttal in case defendant should claim that it had sent or mailed any notice to Guy C. Phinney, or claim any benefit of any notice claimed to have been sent to said Phinney. That the answers of said witnesses, together with other evidence that plaintiff would have at hand, would enable plaintiff to prove that the notice required by the statute of New York had never been mailed to said Phinney. That plaintiff desired to prove the custom of said defendant as to the mailing of notices to its policy holders, under any and all circumstances. That such evidence would disclose the fact that no notice was mailed at all to Guy C. Phinney. Whereupon said defendant, by its attorneys, then stated and declared to plaintiff and said Court that said defendant was not claiming to have mailed any notice to said Phinney. That it had not alleged in its answer that it had mailed any notice to said Phinney, and was not claiming and would not claim any benefit from the mailing or sending any notice to said Phinney. Whereupon, relying upon the statements of said counsel, said Court sustained defendant's objections and exceptions to said interrogatories and denied to plaintiff the right of having said interrogatories answered.

Twenty-first Exception.

After the conclusion of the testimony and prior to the argument of counsel, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"Notwithstanding the requirements of the statute of New York that notices in a particular form and at the time prescribed shall be sent by life insurance companies, before they shall have power to declare a policy of life insurance forfeited, yet, if the jury find from the evidence that the defendant sent a notice to the said Guy C. Phinney, although such notice was not in the form, nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney before the maturity of said premium came to the representative of the company, and requested further time in which to pay said premium, and such extension of time was refused by said representative, and said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and that said premium was not paid, or tendered by or on behalf of said Phinney at its maturity, then you are instructed that such notice so sent and acted upon would constitute a sufficient compliance with the provisions of the statute of New York, in regard to the sending of notice, although the said notice was not in the form prescribed nor at the time required by said statute; and if you find the facts so to be, you are directed to find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and the said exception was duly allowed by the Court.

The evidence relating to the matter referred to in

said requested instruction ~~is~~ set forth in exception number twenty.

Twenty-second Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"If you find from the evidence in this case that the said Phinney did not pay the premium falling due September 24, 1891, and by his subsequent course led the defendant to believe that he considered his policy forfeited, and that he no longer relied thereon as a binding contract, and that he had abandoned the same, then his executrix would be estopped from now asserting the validity of said policy in this action; and if you find the facts so to be, you will find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

The evidence relating to the matters referred to in said requested instruction is set forth in exception number twenty.

Twenty-third Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court in writing to give the following instruction to the jury:

“If you find from the evidence that said Phinney did not pay or tender the premium falling due on September 24, 1891, and that his course of conduct with the defendant prior to his death and the course of dealing with the defendant of the plaintiff subsequent to his death are inconsistent with the idea that they or either of them relied upon the policy as a valid contract, and such as to lead the defendant to believe that no reliance was placed by them in said policy as a valid contract, and that the same had been abandoned, the plaintiff would be estopped from now asserting the validity of said contract; and if you so find the facts to be, you must find a verdict for the defendant.”

Which instruction the Court refused to give, whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

F. L. STINSON, a witness in behalf of the plaintiff, having been duly sworn, testified as set forth in the twentieth exception herein. And NELLIE PHINNEY, called as a witness in her own behalf, testified, among other things, as follows:

Q. Did you ever mail a letter to the Mutual Life Insurance Company of New York as executrix?

A. I did.

Q. I hand you this paper, and ask you if you can identify that as a copy of this letter?

A. I do, Mr. Warburton.

Plaintiff offers in evidence paper identified by witness.

Paper admitted without objection, and marked Plaintiff's Exhibit "C."

EXHIBIT "C."

"Seattle, Wash'n, July 11th, 1894.

The Mutual Life Insurance Co. of New York:

Gentlemen: In September 24, 1890, my husband, Guy C. Phinney, took out a policy, No. 422198, in your company in the sum of one hundred thousand dollars. He died in this city last September 12, 1893. Not being familiar with his affairs, and the policy being mislaid, I was not aware that he held such a policy until a few days ago, when the matter was brought to my attention. You will please consider this a notice of his death and a request for the payment of the policy. If there are any other preliminaries required before you will pay the same, or anything further you require me to do, advise me at once, and I will be ready to comply therewith. I am the executrix of his estate.

Yours sincerely,

NELLIE PHINNEY,

Executrix of the estate of Guy C. Phinney."

Q. By Mr. Gilman.—Mrs. Phinney, this letter of July 11, 1894, was the first communication that you made to the company concerning the policy of your husband?

A. It was.

Q. How long before that had you learned that he had such a policy?

A. Well, I had always understood—a long time, that Mr. Phinney had this policy.

Q. You had understood for a long that he had held such a policy? A. That he held such a policy.

Q. Why then did you state in your letter this: "I was not aware that he held such a policy until a few days ago, when the matter was brought to my attention" ?

A. I do not remember.

Q. Is it a fact as stated in that letter to the company, that you were not aware that he held such a policy until a few days ago when it was brought to your attention? Just refresh your memory and see if it had not been brought to your attention just a few days before it was written.

A. No, I had always known that he carried a policy; I don't know that I knew just the name of the company exactly, but I always understood that he carried a hundred thousand dollar policy.

Q. From whom did you gather the information that you speak of in that letter?

A. The first party I spoke of it I think was to Mr. Higgins of Victoria.

Q. Do you know where Mr. Higgins got his information? A. I do not.

Q. You know at the time that Mr. Phinney died that he had a hundred thousand dollar policy insurance?

A. I did.

Q. That was alive? A. I did.

Q. Why then in your petition for letters testamentary to the Superior Court of this county, did you state that his estate only amounted to only fifty thousand dollars?

A. I do not remember just now.

Q. Now as a matter of fact, Mrs. Phinney, did not Mr. Phinney before his death tell you that he had given up this hundred thousand dollar policy?

A. He did not.

Q. Can you give any explanation, then, why you put this estate at fifty thousand dollars?

A. No, I cannot. I don't know what I did.

Q. You knew then before his death that he held a hundred thousand dollar policy in the Mutual Life?

A. I did.

Q. You knew that fact? A. Yes, sir.

Q. He told you that fact? A. He did.

Q. Why did you wait nine months before you wrote the Mutual Life in reference to that policy?

A. Well, I was very ill for a number of months after Mr. Phinney's death.

Q. Mrs. Phinney, Mr. Phinney had other life insurance? A. He did.

Q. How long after his death did you wait before you put in a claim for that insurance?

A. I could not tell you just how long. I do not remember.

Q. Did you not put in a claim on the other insurance within a month after his death? A. Yes, sir.

Q. And yet, knowing that he held this hundred thousand dollar policy in the Mutual Life you waited nine months before making the claim?

A. The policy could not be found.

Q. You never did find it, did you? A. No.

Q. You haven't it now, have you? A. No.
claim? A. No.

Q. You did not have it when you finally did make the

Q. Why didn't you write this company before and ask them to pay it, instead of waiting nine months before doing it?

A. I was too ill at the time to attend to it.

Q. You were not too ill to collect your other policies? You had an attorney, didn't you, who was managing this matter for you, Mr. Burleigh? A. I did.

Q. Did you ever tell Mr. Burleigh that that hundred thousand dollar policy was in existence?

A. I think I did.

Q. He took no steps to collect it?

A. I don't know that he did.

Q. You don't know that Mr. Burleigh took no steps to collect the hundred thousand dollars belonging to you, although you told him about it? A. Yes, sir.

Q. Is it not a fact you didn't know anything about this policy until Mr. Warburton came over from Tacoma and told you about it? A. No, sir.

Q. Had not you had a consultation with Mr. Warburton before you sent that letter? A. Yes, sir.

Q. And did not Mr. Warburton tell you that he had another case—same kind of a case?

A. I think he did.

Q. And it was not until after Mr. Warburton told you that you ever thought of putting in any claim on this policy—is not that a fact, Mrs. Phinney?

A. No, sir.

Q. But it was after Mr. Warburton told you that you did put in a claim on the policy? A. Yes, sir.

Q. Mr. Burleigh drew this petition for letters testamentary, didn't he? A. I think he did.

Q. Did you tell him at that time what property Mr. Phinney owned? A. I do not remember.

Q. Did you tell him about that hundred thousand dollar policy at that time? A. I think I did.

Q. You swore to this petition, and swore that the estate was fifty thousand dollars?

A. I do not remember.

Q. Where did you find Mr. Phinney's policies of life insurance at the time of his death?

A. I did not find them myself.

Q. Did you ever make any search for this policy?

A. Search has been made—not by me.

Q. You did not make any search personally?

A. No, sir.

Q. Mrs. Phinney, the fifty thousand dollars on your husband's, and the ten thousand dollars was payable to the children? A. To the children.

Q. Neither one of these policies belong to the estate?

A. No, sir.

In addition to said evidence in her own behalf plaintiff introduced a certified copy of her petition for the probate of the last will and testament of Guy C. Phinney, deceased, which was received as evidence and marked Exhibit "A," and is as follows:

EXHIBIT "A."

"In the Superior Court for the County of King, State of Washington. In the matter of the estate of Guy C. Phinney, deceased. Petition for probate of will. To the Honorable the Superior Court for the County of King, State of Washington.

"The petition of Nellie Phinney of the county of King, State of Washington, respectfully shows that Guy C. Phinney died on or about the 12th day of September, 1893, at the said county of King, State of Washington, being then and there of the age of forty-one years; that said deceased was at the time of his death a resident of the said county of King, and left estate therein consisting of real and personal property; that the probable value and character of said estate are as follows, to-wit:

"Real estate, consisting of lands in said King county, of town lots in the city of Seattle, and of improved city property, the exact description of all which is at this time unknown to your petitioner, but which is entirely community estate, the value of which is about three hundred thousand dollars; that there is personal property of various kinds, all of the same being community property, of the value of about fifty thousand dollars; that the total estate of said deceased, including the community interest of your petitioner, who is the widow of said deceased, does not exceed in value the sum of about three hundred and fifty thousand dollars; that said deceased left a will bearing date of the first day of September, 1893, in the possession of your petitioner, which your petitioner believes, and therefore alleges, to be the last will and testament of said deceased, and which is presented to said Superior Court; that your petitioner, Nellie Phinney, named in said will as executrix thereof, consents to act as such, and that Willie Carleton Phinney and Arthur Alexander Phinney, sons of said deceased, are named therein as devisees; that the subscribing witnesses to said will are

Charles J. Brenton, residing at the city of Seattle, King County, Washington, and William W. Grass, residing at the city of Seattle, King County, Washington; that the next of kin of said deceased, as your petitioner is advised and believes, and therefore alleges, to be the heirs of law of said deceased, and the names, ages, and residences of said heirs are his surviving wife, Nellie Phinney, your petitioner, aged about twenty-six years, residing at the city of Seattle, King County, State of Washington, his said sons, Willie Carleton Phinney, aged about 9 years, and Arthur Alexander Phinney, aged about 8 years, residing at said city of Seattle; that at the time said will was executed, to-wit, on the first day of September, 1893, the said testator was over the age of twenty-one years, to-wit, of the age of forty-one years, or thereabouts, and was of sound and disposing mind and memory and not acting under duress, menace, fraud, or undue influence, and was in every respect competent by last will to dispose of his estate; that said will is in writing, signed by said testator and attested by said subscribing witnesses at the request of said testator, subscribing their names to the said will in the presence of the said testator and in the presence of each other; and that as your petitioner is advised, and therefore alleges, said witnesses at the time of attesting the execution of said will were and are now competent; that in and by said will said testator provided that said estate should be settled in the manner provided in said last will and testament, and that letters testamentary or of administration should not be required, except such will should be admitted to probate in the manner required by existing laws, and that after the probate of such will

said estate should be managed and settled without the intervention of the Court, as in said last will and testament provided.

Wherefore, your petitioner prays that the said will may be admitted to probate and for that purpose, and that the time for proving said will be appointed, that all persons interested be directed to appear at the time appointed for proving the same, and that upon the probate of said will an order may be made vesting said estate in your petitioner as executrix, to be managed and settled as provided by law, and by said last will and testament, without the intervention of the Court, and that all other necessary and proper orders may be made in the premises, and your petitioner will ever pray, etc.

Dated this 16th day of September, 1893.

NELLIE PHINNEY, Petitioner.

A. F. BURLEIGH,

Attorney for Petitioner.

State of Washington,)
County of King.) ss.

Nellie Phinney, being first duly sworn, deposes and says that she is the petitioner in the foregoing petition; that she has heard the same read, and knows the contents thereof, and believes the same to be true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 16th day of September, 1893.

[Seal]

ANDREW F. BURLEIGH,

Notary Public, residing at Seattle, King County, Wash.

Filed September 18, 1893. T. W. Gordon, Clerk. By
D. C. Gordon, Depy.

*In the Superior Court of the State of Washington for the
County of King.*

State of Washington, }
County of King. } ss.

I, T. J. Humes, Judge of the above-entitled Court, the same being a Court of record, do hereby certify that T. W. Gordon is the clerk of said Court, and was such clerk at the time of making and subscribing the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name, at Seattle, King County, Washington, this 22nd day of July, 1895.

T. J. HUMES,

Judge of the Superior Court of King County, Washington.

On redirect examination, plaintiff, Mrs. Nellie Phinney, testified as follows:

Q. By Mr. Warburton.—You say that Mr. Phinney never told you this policy was forfeited? A. No.

Q. Did he ever tell you it was alive? A. Yes.

Q. How many times did he tell you it was alive?

A. I could not tell you just how many times, but a number of times.

Q. How long prior to his death did he mention this policy as being one of his policies of insurance that was in force? A. Not more than two weeks.

Q. Did he give you any directions as to the use of the insurance you should collect? A. Yes, sir.

Q. Mention this policy among them?

A. Yes, sir.

Q. You say you did have several conversations with Mr. Burleigh about this?

A. Well, I don't know several—I know I have talked with Mr. Burleigh.

Q. Did you talk to others about it?

A. No.

Q. State the condition of your health, Mrs. Phinney, immediately after the death of your husband.

Objected to by counsel for defendant as immaterial.

Objection overruled, exception allowed.

Q. For the first nine months after Mr. Phinney's death.

A. The first year after Mr. Phinney's death I was seriously ill.

Q. Were you able to attend to business at all during that time? A. No; I was not.

Q. These policies were collected by your agent, were they not? A. Yes, sir.

Q. The business matters were all turned over to the other parties?

A. All done through other parties.

Q. Who prepared that letter, Mrs. Phinney, that you mailed to New York?

Objected to by counsel for defendant as immaterial.

And WM. S. POND, being called as a witness on behalf of the defendant, testified among other things, as follows:

Q. By Mr. Gilman.—You reside in Seattle?

A. In Seattle, Washington.

Q. And what is your business?

A. I am at present the general agent of the Mutual Life Insurance Company of New York.

Q. What territory does your agency cover?

A. Washington, Oregon, and British Columbia.

Q. How long have you held that position?

A. Since the first of January, 1895.

Q. Were you connected with the company before that time?

A. Before that I was a representative of Mr. Forbes of San Francisco.

Q. What I want to get at is this—did you assume Stinson's position at the time he left it?

A. Yes, sir; I assumed it as manager for Forbes; and in the first of this year I was appointed the general agent direct from New York.

Q. So that since Stinson left the company you have been its head in this State?

A. Yes, sir.

Q. And that was in the latter part of 1893, that you assumed that position?

A. Well, in November, 1893, I came here as cashier for Mr. Forbes, and it was after Mr. Stinson was discontinued that I became manager.

Q. Now, during the time that you have had charge of the business of the company in this State up to July, 1894, what, if any, claim was made by Mrs. Phinney to you upon the policy now in suit?

A. There was no claim made until an inquiry was made in July, 1894.

Q. Who made that inquiry?

A. The first inquiry came by telephone, I could not identify it exactly.

Q. I will ask you whether or not you ever learned from Mrs. Phinney who it was that telephoned?

A. I think the first intimation I had of any claim from Mrs. Phinney was the coming to my office of some clerk who told me that Mrs. Phinney had telephoned to know about her husband's insurance, and so as soon as I came in, I looked up the record. That was the first knowledge I had that there was a policy at all. I found out in the old book that there was a policy for one hundred thousand dollars taken in 1890, and lapsed after the payment of the first premium.

Q. Did you go to the telephone?

A. Yes, and within a day I think I called up Mrs. Phinney myself. I am not sure it was a telephone at the residence or how it was, but I communicated a second time; but she asked if I was the manager, and I said yes, and she inquired whether Mr. Phinney had a policy in the company, and I inferred from the conversation that she didn't know how much it was, or the number of it, or anything about it—in fact, she asked me the amount.

Q. At that time did Mrs. Phinney ask the amount of the policy?

A. Yes, sir, asked for how much he was insured, I said he had a policy for a hundred thousand dollars, but it was not in force. I think she inquired whether it was possible that it would be in force, and I said no, not unless the premiums had been paid direct to the home office which seemed highly improbable, because both he and Stinson lived in the city, and the natural course would be to pay them through him, so I then wrote to San Francisco to inquire if possibly these premiums had been paid, and found

out substantially that the policy had lapsed after the payment of the first premium. Reference is also made to all the evidence above set forth under the 20th exception.

Twenty-fourth Exception.

After the conclusion of the evidence, and prior to the argument of counsel, and prior to the charge of the Court to the jury, the defendant requested the Court in writing to give the following instruction to the jury

"If you find from the evidence that the said Guy C. Phinney stated to defendant's representatives in the State of Washington that he could not pay his premium falling due on the 24th day of September, 1891, it was equivalent to his saying that he could not go with the contract, and that he abandoned the same, and if you find that the defendant assented thereto, then this would end the contract; and if you so find the facts to be, you must find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

The evidence relating to the matters referred to in said requested instruction is set forth in exception number twenty.

Twenty-fifth Exception.

After the conclusion of the evidence in the case, and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, the defendant requested the Court in writing to give the following instructions to the jury:

"If you find from the evidence in this case that the said Guy C. Phinney stated to the representatives of the defendant in the State of Washington that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representative, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the nonpayment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the same; and if you find the facts so to be, you must find a verdict for the defendant."

Which said instruction the Court refused to give, whereupon, and while the jury were still at the bar, defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

The evidence relating to the matters referred to in said requested instruction is set forth in exception number twenty.

Twenty-sixth Exception.

After the conclusion of the evidence, and prior to the argument of counsel to the jury, and prior to the charges of the Court to the jury, the defendant duly requested the Court in writing to give the following instruction to the jury:

"The statute of New York relied upon by the plaintiff relieves against the forfeiture without the sending of a proper notice in a single instance only. It does not contemplate successive defaults, nor does it in a particular

case relieve the assured of more than one default. The assured cannot go on year after year without the payment of premiums, and have his policy still kept alive by the statute, and if successive defaults occur the policy is forfeited, notwithstanding the provisions of the law of New York of 1876 and 1877, and only in a proper case the policy holder is entitled to the benefit of the act of New York of 1879 relating to the surrender value of policies forfeited.

"And if you find from the evidence that Guy C. Phinney did not pay the premium of 1892, you must find a verdict for the defendant."

Which said instruction the Court refused, whereupon defendant, while the jury was still at the bar, excepted in writing to the refusal of the Court to give said instruction, and said exception was duly allowed by the Court.

There was positive, certain, and direct evidence that the premium falling due on the policy in suit September 24, 1892, was not paid, and nothing to rebut this evidence.

The other evidence relating to the matters referred to in said requested instruction is set forth in exception No. 20.

Twenty-seventh Exception.

After the conclusion of the evidence and prior to the argument of counsel to the jury, and prior to the charge of the Court to the jury, defendant duly requested the Court, in writing, to give the following instruction to the jury:

"Upon all the evidence in this case you are instructed to find a verdict in favor of the defendant."

Which said instruction was refused by the Court, whereupon, and while the jury was still at the bar, the defendant duly excepted in writing to the refusal of the Court to give said instruction, and its exception was duly allowed by the Court.

The following is all the evidence in the case:

In the Circuit Court of the United States, District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

No. 418.

Transcript of Testimony and Proceedings.

This case coming on regularly for trial this 25th day of July, A. D. 1895, before Hon. C. H. HANFORD, Judge, and a jury, plaintiff appearing in person and by S. Warburton, Esq., A. F. Burleigh, and Murry & Christian, her counsel, and the defendant appearing by its agents, and by Messrs. Strudwick & Peters, and L. C. Gilman, Esq., of Stratton, Lewis & Gilman, of counsel, the following testimony was offered and proceedings had:

Plaintiff's Testimony.

Plaintiff offers in evidence certified copy of petition for probating of last will and testament of Guy C. Phinney, deceased.

Paper received without objection, and marked plaintiff's Exhibit "A."

EXHIBIT "A."

"In the Superior Court for the county of King, State of Washington. In the matter of the estate of Guy C. Phinney, deceased. Petition for probate of will. To the Honorable, the Superior Court of the county of King, State of Washington.

The petition of Nellie Phinney, of the county of King, State of Washington, respectfully shows, that Guy C. Phinney died on or about the 12th day of September, 1893, at the said county of King, State of Washington, being then and there of the age of forty-one years; that said deceased was at the time of his death a resident of the said county of King, and left estate therein consisting of real and personal property; that the probable value and character of said estate are as follows, to-wit:

Real estate, consisting of lands in said King county, of town lots in the city of Seattle, and of improved city property, the exact description of all which it at this time unknown to your petitioner, but which is entirely community estate, the value of which is about three hundred thousand dollars; that there is personal property of various kinds, all of the same being community property of the value of about fifty thousand dollars; that the total

estate of said deceased, including the community interest of your petitioner who is the widow of the said deceased, does not exceed in value the sum of about three hundred and fifty thousand dollars; that said deceased left a will bearing date of the first day of September, 1893, in the possession of your petitioner which your petitioner believes, and therefore alleges, to be the last will and testament of said deceased, and which is presented to said Superior Court; that your petitioner, Nellie Phinney, named in said will as executrix thereof, consents to act as such, and that Willie Carleton Phinney and Arthur Alexander Phinney, sons of said deceased, are named therein as devisees; that the subscribing witnesses to said will are Charles J. Brenton, residing at the city of Seattle, King county, Washington, and William W. Grass, residing at the city of Seattle, King County, Washington; that the next of kin of said deceased, as your petitioner is advised and believes, and therefore alleges, to be the heirs of law of said deceased, and the names, ages, and residences of said heirs, are his surviving wife, Nellie Phinney, your petitioner, aged about twenty-six years, residing at the city of Seattle, King county, State of Washington, his said sons, Willie Carleton Phinney, aged about nine years, and Arthur Alexander Phinney, aged about 8 years, residing at said city of Seattle; that at the time said will was executed, to-wit, on the first day of September, 1893, the said testator was over the age of twenty-one years, to-wit, of the age of forty-one years or thereabouts, and was of sound and disposing mind and memory, and not acting

under duress, menace, fraud, or undue influence, and was in every respect competent by last will to dispose of his estate; that said will is in writing, signed by said testator, and attested by said subscribing witnesses at the request of said testator, subscribing their names to the said will in the presence of the said testator, and in the presence of each other; and that as your petitioner is advised, and therefore alleges, said witnesses, at the time of attesting the execution of said will, were and are now competent; that in and by said will said testator provided that said estate should be settled in the manner provided in said last will and testament, and that letters testamentary or of administration should not be required, except such will should be admitted to probate in the manner required by existing laws, and that after the probate of such will said estate should be managed and settled without the intervention of the Court, as in said last will and testament provided.

Wherefore, your petitioner prays that the said will may be admitted to probate, and for that purpose; that the time for proving said will be appointed; that all persons interested be directed to appear at the time appointed for proving the same, and that upon the probate of said will an order may be made vesting said estate in your petitioner as executrix, to be managed and settled as provided by law and by said last will and testament, without the intervention of the Court, and that all other necessary and

v. Nellie Phinney, Executrix, etc.

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proper orders may be made in the premises, and your petitioner will ever pray, etc.

Dated this 16th day of September, 1893.

NELLIE PHINNEY, Petitioner.

A. F. BURLEIGH,

Attorney for Petitioner.

State of Washington, }
County of King, } ss.

Nellie Phinney, being first duly sworn, deposes and says, that she is the petitioner in the foregoing petition; that she has heard the same read, and knows the contents thereof, and believes the same to be true.

NELLIE PHINNEY.

Subscribed and sworn to before me this 16th day of September, 1893.

[Seal]

ANDREW F. BURLEIGH,

Notary Public, residing at Seattle, King County, Wash.

Filed September 18, 1893.

T. W. GORDON, Clerk.

By H. C. Gordon, Dep'y.

*In the Superior Court of the State of Washington for the
County of King.*

State of Washington, }
County of King. } ss.

I, T. J. Humes, Judge of the above-entitled Court, the same being a Court of Record, do hereby certify that T. W. Gordon, is the clerk of said Court, and was such clerk at the time of making and subscribing the foregoing certificate, and that the attestation of said clerk is in due form of law, and by the proper officer.

In testimony whereof, I do hereby subscribe my name, at Seattle, King County, Washington, this 22nd day of July, 1895.

T. J. HUMES,
Judge of the Superior Court of King County, Washington.

In the Superior Court of King County, State of Washington.

State of Washington, }
County of King. } ss.

In the matter of the estate of Guy C. Phinney.

I, T. W. Gordon, County Clerk of King County, and ex-officio clerk of the Superior Court of said county, do hereby certify that I have compared the foregoing copy with the original petition for probate of will in the above-entitled proceeding as the same appears on file in my office, and that the same is a true and perfect transcript of said original, and of the whole thereof.

Witness my hand and the seal of the said Superior Court at my office in Seattle, this 22 day of July, 1895.

[Seal]

T. W. GORDON, Clerk.

[Endorsed]: "Plaintiff's Exhibit 'A.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres. By R M. Hopkins, Deputy."

Plaintiff offers in evidence a certified copy of the will of Guy C. Phinney, deceased, probate of will, and decree admitting will to probate. Papers received without objection, and marked Plaintiff's Exhibit "B."

Exhibit "B."

"In the Name of God, Amen. I, Guy C. Phinney, of the city of Seattle, county of King, State of Washington, of the age of forty-one years, and being of sound mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whatever, do make, publish, and declare this my last will and testament, in manner following, that is to say:

First. I direct that my body be buried with proper regard to my station and condition in life and the circumstances of my estate.

Secondly. I direct that my executrix hereinafter named so soon as she has sufficient funds in her hands belonging to my estate, pay my funeral expenses and the expense of my last sickness.

Thirdly. I direct that my executrix hereinafter named, as soon as she shall have sufficient funds in her hands, pay or cause to be paid all my just debts so soon as the same shall mature and become and be due and payable.

Fourthly. I here and now recognize, assert, and declare the community right, title, interest, and estate of my wife Nellie Phinney, of, in and to each and every and all of the real estate now owned by me, and of which I may die seized.

Fifthly. I give and bequeath to my dear son, Willie Carleton Phinney, all and singular my sporting case, guns, dogs, and fishing apparatus and outfit for him and his use, benefit, and advantage.

Sixthly. I give and bequeath to my dear son, Arthur Alexander Phinney, my collection of coins, watch and chain for him and his use and benefit and advantage.

Seventhly. I give, bequeath, and devise to my dear children, Willie Carleton Phinney and Arthur Alexander Phinney, to be divided equally between them, share and share alike, all and singularly, the rest, residue, and remainder of my estate, real, personal, and mixed, of which I may die the owner, to have and to hold the same, each and every and all thereof, to them, said Willie Carleton Phinney, and Arthur Alexander Phinney, their heirs and assigns forever. The same to be made over and delivered to them and to each of them when the youngest child, Arthur Alexander Phinney, shall reach the age of twenty-one years. In the mean time out of the rents, issues, and profits of my said estate in this paragraph of my will mentioned and referred, to my executrix hereinafter named or her successor, shall use and expend such proper sums as shall from time to time be necessary and in accordance with the circumstances of my estate for the proper care, maintenance, and education of my living children or child

Eighthly. I commit the tuition, care, maintenance, custody, and education of my children, and each of them, for such time as they or either of them respectively continue unmarried and under the age of twenty-one years, unto my wife Nellie Phinney, provided she remain my widow but if she shall die or marry during the single life or non age of either of my said children, I hereby dispose of and commit their tuition, care, maintenance, custody, and edu-

cation to my executor hereinafter named as successor to my wife Nellie Phinney.

Ninthly. In the administration and settlement of my said estate, my executrix and her successor are by me empowered and authorized to do each, every, and all acts, act, and things that may become and be necessary, wise, or best; and I here and now provide, order, and direct that my said estate shall be settled by my said executrix or by her successor, as herein directed without the aid, intervention, interference, order, judgment, decree, direction or control of the Superior Court of King County having probate jurisdiction, board, or any other Court or person whatever. That letters or letter testamentary or of administration shall not be required, and that all I require is that this, my last will and testament shall be admitted to probate in the manner required by existing laws, and in the course of the settlement of my estate, if and whenever it shall become and be necessary, wise, and best to sell the same or any part of the same, "always reserving until the last necessity Woodland Park of the supplemental plat of Woodland Park addition to the City of Seattle," at either public or private sale for the *necessary* carrying out of the provisions of this my last will and testament, my said executrix or her successor hereinafter named, may sign, seal, acknowledge, and deliver any and all necessary instruments of conveyance thereof without application to the said Court or any Court, order of sale, or any intervention of said Court whatsoever thereof, and I do further de

clare my will to be and I direct that my said executrix shall not nor shall her successor hereinafter named be required to give any bond, bonds, obligations, or furnish or give any surety or sureties whatever for the faithful performance by them, or either of them, of such trust by me herein and hereby reposed in them.

Lastly. I nominate and appoint my wife Nellie Phinney my executrix of this my last will and testament, to serve as such executrix so long as she shall remain unmarried; and, in case of her marriage or death, I nominate and appoint my brother John Ingalls Phinney, now of Wilmot, Annapolies County, Nova Scotia, to succeed my said executrix in said trust as executor of this my last will and testament, and I hereby revoke any and all former wills by me made, and I declare my will to be that my said executor, John Ingalls Phinney, so nominated as successor to my said executrix, shall receive the sum of five thousand (\$5000.00) dollars, and no more, as and for his compensation as such successor and executor.

In witness whereof, I have hereunto set my hand and seal this first day of September, in the year of our Lord one thousand eight hundred and ninety-three (1893).

[Seal]

GUY C. PHINNEY.

The foregoing instrument, consisting of five pages besides this one, was, at the date hereof, by the said Guy C. Phinney, signed and sealed and published as, and declared to be, his last will and testament, in presence of us, who at his request, and in his presence, and in the presence of

each other, have subscribed our names as witnesses there to.

CHARLES J. BRENTON,

Residing at the city of Seattle, King county, Washington

WILLIAM W. GRASS,

Residing at the city of Seattle, King County, Washington.

[Endorsed]: 1894. Last will and testament of G. C. Phinney. Filed September 18th, 1893. T. W. Gordon Clerk. By H. C. Gordon, Deputy.

"In the Superior Court of King County, State of Washington.

In probate. In the matter of the estate of Guy C. Phinney, deceased. No. 1814.

Certificate of Probate of Will.

County of King-ss

I, J. W. Langley, Judge of the Superior Court of said King County, do hereby certify that the annexed instrument purporting to be the last will and testament of Guy C. Phinney, deceased, was by our Superior Court, on the 19th day of September, 1893, duly admitted to probate as and for the last will and testament of the said Guy C. Phinney, deceased.

And from the proofs taken and the examination had thereon, the Court finds as follows:

That said Guy C. Phinney died on or about the 12th day of September, 1893, in King County, in Washington, and at the time of his death was a resident of the county of King in said State of Washington.

That the said annexed will was duly executed by said Guy C. Phinney in his lifetime in the county of King, in said State of Washington, in the presence of Charles J. Brenton and William W. Grass the subscribing witnesses thereto; also that said Guy C. Phinney acknowledged the execution of the same in the presence of the said subscribing witnesses and declared the same to be his last will and testament, and the said witnesses attested the same at his request, in his presence, and in the presence of each other

That the said decedent at the time of executing the said will was above the age of majority, to-wit: of the age of about forty-one years, and was of sound and disposing mind, and not under duress, menace, fraud, nor due influence, nor in any respect incompetent to devise and bequeath his estate.

In testimony whereof, I have hereunto set my hand and caused the seal of the said Superior Court to be hereunto affixed this 19th day of September, 1893.

[Seal]

J. W. LANGLEY,

Judge of the Superior Court of King County, State of Washington.

Attest: T. W. Gordon, Clerk of the Court. By H. C. Gordon, Deputy Clerk."

*In the Superior Court of the State of Washington for the
County of King.*

In Probate. No. 1814. In the matter of the estate of Guy C. Phinney, deceased.

Decree Admitting Will to Probate.

Nellie Phinney having on the 18th day of September, 1893, submitted to and filed in this Court a certain document in writing, of a testamentary nature, purporting to be the last will and testament of Guy C. Phinney, deceased and also her petition praying, among other things, for the admission to probate of the said document as and for the last will and testament of the said deceased.

And this Court having by order duly made on the 18th day of September, 1893, appointed the 19th day of September, 1893, at 5 o'clock P. M. for the proving of the said will and the hearing of the said petition.

Now, on this 19th day of September, 1893, the hearing of the said petition comes on regularly before the Court in open session;

And it fully appearing to the satisfaction of the Court that the said petition sets forth all the facts necessary to give this Court jurisdiction over the estate of the said deceased, and jurisdiction to admit to probate the last will and testament of the said deceased, and witnesses have been examined under oath, and their testimony taken and reduced to writing in open Court, to-wit: the testimony of Charles J. Brenton and William W. Grass, subscribing witnesses to the said will, and the same having been filed and the evidence being closed, and the matter having been duly and regularly and finally submitted to the Court for consideration and decision, and all and singular the law and the premises being now by the Court here fully under

stood and duly considered, the Court finds the facts applicable to this matter to be as follows: That the said Guy C. Phinney died testate on the 12th day of September 1893, at Seattle, King County, Washington. That at the time of his death the said deceased was a resident of King County, Washington, and left estate in said King County subject to administration in the State of Washington.

That said document, purporting to be the last will and testament of the said Guy C. Phinney, deceased, was duly executed by him in his lifetime, to wit: on the 1st day of September, 1893, at Seattle, King County, Washington in the presence of at least two competent witnesses, to wit: Charles J. Brenton and William W. Grass, the subscribing witnesses thereto, and also that the said deceased then and there, in the presence of the said witnesses, published the said document as, and declared the same to the said witnesses to be, his last will and testament, and the said witnesses then and there attested the same at his request and in his presence and in the presence of each other.

That the said deceased, at the time of executing the said last will and testament, was over the age of majority, to wit: of the age of about 41 years, and was of sound and disposing mind and memory, and not acting under duress menace, fraud, nor any undue influence whatsoever, nor in any respect was he incompetent by last will to devise and bequeath his estate.

That Nellie Phinney is named in the said will as executrix to serve without bonds; that the said Nellie Phinney is a surviving wife of the said deceased, and is a resident of the State of Washington, above the age of twenty-one

years, and a suitable and competent person to act as executor of the last will and testament of the estate of said deceased.

Now, therefore, by reason of the law and facts afore said, it is considered, ordered, adjudged, and decreed by the Court here that the jurisdiction to admit the last will and testament of the said deceased appertains unto our said Superior Court; that the said document submitted for probate on the 18th day of September, 1893, is the last will and testament of the said Guy C. Phinney, deceased and that the same was properly and legally executed, and is entitled to be, and is, hereby admitted to probate.

That a certificate of probate thereof be granted, and that the said last will and testament, together with said certificate, be duly entered of record in the record of wills in this Court, as provided by law, and that the said Nellie Phinney be, and she is hereby, appointed executrix of said estate without bonds, and that the same forthwith vest in her as provided by law and the terms of said last will and testament, to be managed and settled by her without the intervention of the Court, as provided in said last will and testament.

Done in open Court this 19th day of September, 1893.

J. W. LANGLEY,

Judge of said Superior Court of King County, State of Washington."

[Endorsed]: "No. 1814. Superior Court, King County Probate Department. Estate of Guy C. Phinney, de

ceased. Decree admitting will to probate. Filed Sep. 19 1893. T. W. Gordon, Clerk. V. 402."

"In the Superior Court of King County, State of Washington.

State of Washington, }
County of Pierce. } ss.

In the matter of the estate of Guy C. Phinney, deceased
No. 1814.

I, T. W. Gordon, county clerk of King county, and ex officio clerk of the Superior Court of said county, do hereby certify that I have compared the foregoing copy with the original will, certificate of probate of will, and decree admitting will to probate in the above-entitled estate as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Superior Court at my office in Seattle this 24th day of July, 1895.

[Seal.]

T. W. GORDON, Clerk.

By S. N. Peterson, Deputy Clerk."

[Endorsements]: "In the Superior Court of King County, Washington. No. 1814. In the matter of the estate of Guy C. Phinney, deceased. Plaintiff's Exhibit 'B'. Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres Clerk. By R. M. Hopkins, Deputy."

MRS. NELLIE PHINNEY, plaintiff, being first duly sworn, testified as follows:

Q. (By *Mr. Warburton*). Mrs. Phinney, you are the party named in the last will and testament as executrix?

A. Yes, sir.

Q. You may state your residence and citizenship.

A. Seattle.

Q. State of Washington. A. Washington.

Q. A citizen of the State of Washington?

A. I am.

Q. Did you ever mail a letter to the Mutual Life Insurance Company of New York, as executrix?

A. I did.

Mr. Warburton. I have given the defendant notice to produce a letter written by Mrs. Phinney to the defendant, dated July 11th, 1894, and I now ask if they have got that in court, so that we may offer it?

Q. How long have you been a citizen of the State of Washington? A. Twenty-one years.

Mr. Gilman. I have no objection to this paper being used as a copy and admitted.

Q. I hand you this paper and ask you if you can identify that as a copy of this letter? A. I do, Mr. Warburton.

Plaintiff offers in evidence paper identified by the witness.

Paper admitted without objection, and marked Plaintiff's Exhibit "C."

Exhibit "C."

"Seattle, Wash'n, July 11th, 1894."

The Mutual Life Insurance Co. of New York.

Gentlemen: In Sept. 24, 1890, my husband, Guy C. Phinney, took out a policy No. 422198 in your company in the sum of one hundred thousand dollars. He died in this

city last Sept. 12, 1893. Not being familiar with his affairs, and the policy being mislaid, I was not aware that he held such a policy until a few days ago, when the matter was brought to my attention. You will please consider this a notice of his death and a request for payment of the policy. If there are any other preliminaries required before you will pay the same, or anything further you require me to do, advise me at once, and I will be ready to comply therewith. I am the executrix of his estate.

Yours sincerely,

NELLIE PHINNEY,

Executrix of the Estate of Guy C. Phinney."

[Endorsed]: "Plaintiff's Exhibit 'C.' Filed July 25 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk By R. M. Hopkins, Deputy."

Q. Did you mail that to the Mutual Life Insurance Company in New York? A. I did.

Q. Did you ever receive any response to that letter?
A. I did.

Q. I hand you letter and ask you to identify it.
A. This is the letter.

Q. You received that in response to this letter? (Exhibit C.) A. Yes, sir.

Plaintiff offers in evidence paper last identified by the witness. Received without objection, and marked Plaintiff's Exhibit "D."

New York, July 19th, 1894.

Mrs. Nellie Phinney, 1201 James Street, Seattle, Washington,

Madam: Acknowledging receipt of your of the 12th

inst., we beg to advise you that policy 422198 on the life of the late Guy C. Phinney was issued September 24th, 1890, and was forfeited September, 1891, for non-payment of premium. This policy, therefore, has no value. If you desire any further information regarding this insurance we respectfully suggest that you should communicate with our general agent, Mr. A. B. Forbes, San Francisco, Cal., through whose agency this policy was issued.

Very truly yours,

N. E. DUNCAN, JR.,

Corresponding Secretary.

[Endorsed]: "Plaintiff's Exhibit 'D.' Filed July 25 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk By R. M. Hopkins, Deputy."

Q. Did you ever receive any letter from one Mr. Pond of this city? I will hand you this letter and ask you to identify it.

A. Yes, I received such a letter.

Q. Who was he? Do you know what relation he held if any, to the Mutual Life Insurance Company of New York?

A. I understood he was agent here.

Plaintiff offers paper identified by witness in evidence.

Received without objection and marked Plaintiff's Exhibit "E."

Exhibit "E."

"Seattle, Wash., July 24th, 1894.

Mrs. Guy C. Phinney, City,

Dear Madam: We beg to advise you that but one pre

mium was paid under your husband's policy 422198 for \$100,000, and therefore the policy lapsed in Sept., 1891. Our senior, Mr. Pond, is in Portland, and upon his return will probably take the first opportunity to call upon you and explain his information in detail.

Yours, very truly,

WM. S. POND, Manager.

Per Geo. R. Carter."

[Endorsed]: "Plaintiff's Exhibit 'E.' Filed July 25, 1895, in U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did Mr. Pond ever call upon you, Mrs. Phinney?

A. He did.

Q. State what conversation occurred.

A. He simply stated that one premium was paid, and that the policy was considered lapsed.

Q. Speak louder.

A. He told me that there had been but one premium paid, and that the policy was considered lapsed; that is about all.

Q. Mrs. Phinney, did you understand, or what was your understanding after receiving these letters with reference to the payment of the policy by the company,

Objected to by counsel for defendant for the reason it is for the Court to determine the import of the letters.

Objection sustained by the Court.

Q. I hand you a paper, Mrs. Phinney, and ask you to identify it.

Mr. Warburton.—Have you the original proofs of death here?

Mr. Gliman—No sir. These papers were mislaid in Mr Short's office, and we have not been able to get them.

Q. Did you make an affidavit similar to that—or is this a copy of the affidavit you made?

A. This is a copy.

Q. Do you recognize this as Mr. Grass' signature?

A. Yes, sir.

Q. Mr. Grass made a like affidavit?

A. Yes, sir; he did.

Q. What did you do with the original of this copy?

A. I handed the original to Mr. Young.

Q. Was ever the first letter or the affidavit returned to you, Mrs. Phinney? A. No; I think not.

Paper marked Plaintiff's Identification "F." Also register receipts 5418 as Plaintiff's Identifications "G" and "H."

Q. Did you ever receive a reply to the affidavits you mailed to New York? (Showing paper to witness.)

A. Yes, sir; I recognize this letter.

Q. Is that in reply to the affidavit? A. Yes, sir

Q. Did these replies that you have spoken of, this and the other letters, come in the ordinary course of mail?

A. Yes, sir.

Plaintiff offers letter identified by the witness, and envelope in evidence. Admitted without objection, and marked respectively Plaintiff's Exhibits "I" and "J."

Exhibit "I."

"Return to the Mutual Life Insurance Co. of New York
Nassau, Cedar and Liberty streets, New York, N. Y., if

not delivered within 5 days. [New York, N. Y., Sept. 4 5:30 P. M., 1894. Mrs. Nellie Phinney, Seattle, Wash.]

[Endorsed]: "Plaintiff's Exhibit 'I.' Filed July 25 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk By R. M. Hopkins, Deputy."

Exhibit "J."

New York, Sept. 4, 1894.

Mrs. Nellie Phinney, Seattle, Wash.,

Dear Madam: We beg to acknowledge receipt of your favor of July inst., enclosing affidavit in re 422188.

We shall give the matter early attention.

Very truly yours,

H. E. DUNCAN, JR.,

Cor. Sec.

"Law Dept. It will require not less than ten days before a reply may be expected in answer to your request."

[Endorsed]: "Plaintiff's Exhibit 'J.' Filed July 25. 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Mr. Warburton.—With reference to the pleadings, your Honor, that the answer admits that this policy set out in the complaint is an exact copy. They have so admitted in open court, and I would like to have it in the record as an admission that it is an exact copy. There is a little question in the reply—it is worded rather peculiarly, and I would like to know whether it is admitted.

Mr. Gilman.—The pleadings are before the Court, and I suppose we are bound by all the admissions contained in

them. As I understand, you plead a policy by copy. That paragraph of your complaint is not denied. We are willing to stand upon the record we have made.

Mr. Warburton.—That is all I care to know.

Q. The policy has not been paid, Mrs. Phinney?

A. No.

Cross-Examination.

Q. (By Mr. Gilman.) Mrs. Phinney, this letter of July 11, 1894, was the first communication that you made to the company concerning the policy of your husband?

A. It was.

Q. How long before that had you learned that he had such a policy?

A. Well, I had always understood—a long time, that Mr. Phinney had this policy.

Q. You had understood for a long time that he had held such a policy?

A. That he held such a policy.

Q. Why, then, did you state in your letter this: "I was not aware that he held such a policy until a few days ago, when the matter was brought to my attention"?

A. I do not remember.

Q. Is it a fact, as stated in that letter to the company that you were not aware that he held such policy until a few days ago, when it was brought to your attention—just refresh your memory and see if it had not been brought to your attention just a few days before it was written.

A. No; I had always known that he carried a policy I don't know that I knew just the name of the company ex

actly, but always understood that he carried a hundred thousand dollar policy.

Q. From whom did you gather the information that you speak of in that letter?

A. The first party I spoke of it, I think, was to Mr Higgins, of Victoria.

Q. Do you know where Mr. Higgins got his information? A. I do not.

Q. You knew at the time that Mr. Phinney died that he had a hundred thousand dollar policy of insurance?

A. I did.

Q. That was alive? A. I did.

Q. Why then in your petition for letters testamentary to the Superior Court of this county did you state that his estate amounted to only fifty thousand dollars?

A. I do not remember just now.

Q. Now, as a matter of fact, Mrs. Phinney, did not Mr Phinney, before his death tell you that he had given up this hundred thousand dollar policy?

A. He did not.

Q. Can you give any explanation, then, why you put his estate at fifty thousand dollars?

A. No, I cannot. I don't know that I did.

Q. You knew then before his death that he held a hundred thousand dollar policy in the Mutual Life?

A. I did.

Q. You knew that fact? A. Yes, sir.

Q. He told you that fact? A. He did.

Q. Why did you wait nine months before you wrote the Mutual Life in reference to that policy?

A. Well, I was very ill for a number of months after Mr. Phinney's death.

Q. Mrs. Phinney, Mr. Phinney had other life insurance? A. He did.

Q. How long after his death did you wait before you put in a claim for that insurance?

A. I could not tell you just how long. I do not remember.

Q. Did you put in a claim on the other insurance within a month after his death? A. Yes, sir.

Q. And yet knowing that he held this hundred thousand dollar policy in the Mutual Life you waited nine months before making the claim?

A. The policy could not be found.

Q. You never did find it, did you. A. No.

Q. You haven't it now, have you? A. No.

Q. You did not have it when you finally did make the claim. A. No.

Q. Why didn't you write the company before and ask them to pay it instead of waiting nine months before doing it?

A. I was too ill at the time to attend to it.

Q. You were not too ill to collect your other policies? You had an attorney, didn't you, who was managing this matter for you, Mr. Burleigh? A. I did.

Q. Did you ever tell Mr. Burleigh that that hundred thousand dollar policy was in existence?

A. I think I did.

Q. He took no steps to collect it?

A. I don't know that he did.

Q. You don't know that Mr. Burleigh took no steps to

collect the hundred thousand dollars belonging to you, although you told him about it? A. Yes, sir.

Q. Is it not a fact you didn't know anything about this policy until Mr. Warburton came over from Tacoma and told you about it? A. No, sir.

Q. Had not you had consultation with Mr. Warburton before you ever sent that letter. A. Yes, sir.

Q. And did not Mr. Warburton tell you that he had another case—same kind of a case?

A. I think he did.

Q. And it was not until after Mr. Warburton told you that that you ever thought of putting in any claim on this policy? Is not that the fact, Mrs. Phinney?

A. No, sir.

Q. But it was after Mr. Warburton told you that you did put in a claim on the policy? A. Yes, sir.

Q. Mr. Burleigh drew this petition for letters testamentary, didn't he? A. I think he did.

Q. Did you tell him at that time what property Mr. Phinney owned. A. I do not remember.

Q. Did you tell him about that hundred thousand dollar policy at that time. A. I think I did.

Q. You swore to this petition, and swore that the estate was fifty thousand dollars?

A. I do not remember.

Q. Where did you find Mr. Phinney's policies of life insurance at the time of his death?

A. I did not find them myself.

Q. Did you ever make any search for this policy?

A. Search has been made—not by me.

Q. You did not make any search personally?

A. No, sir.

Redirect Examination.

Q. (By Mr. Warburton.) You say that Mr. Phinney never told you this policy was forfeited? A. No.

Q. Did he ever tell you it was alive? A. Yes.

Q. How many times did he tell you it was alive?

A. I could not tell you just how many times, but a number of times.

Q. How long prior to his death did he mention this policy as being one of his policies of insurance that was in force? A. Not more than two weeks.

Q. Did he give you any directions as to the use of the insurance you should collect? A. Yes, sir.

Q. Mention this policy among them?

A. Yes, sir.

Q. You say you did have several conversations with Mr. Burleigh about this?

A. Well, I don't know several—I know I have talked with Mr. Burleigh.

Q. Did you talk to others about it? A. No.

Q. State the condition of your health, Mrs. Phinney immediately after the death of your husband.

Objected to by counsel for defendant as immaterial.

Objection overruled; exception allowed.

Q. For the first nine months after Mr. Phinney's death?

A. The first year after Mr. Phinney's death I was seriously ill.

Q. Were you able to attend to business at all during that time? A. No, I was not.

Q. These policies were collected by your agents, were they not? A. Yes, sir.

Q. The business matters were all turned over to other parties? A. All done through other parties.

Q. Who prepared that letter, Mrs. Phinney, that you mailed to New York?

Objected to by counsel for defendant as immaterial.

Objection sustained.

Recross-examination.

Q. (By Mr. Gilman.) Mr. Phinney, shortly before his death, told you all about his affairs.

A. He told me a great deal about them.

Q. You got pretty familiar with them, did you?

A. No, I did not.

Q. Told you about this policy, you recollect that, particularly?

A. Yes; he told me what insurance he had.

Q. And you were fully aware at the time of his death that he held this policy which is sued on in this action?

A. I thought he had this policy.

Q. Well, did not you know; he told you that?

A. Yes, he told me that.

Q. You were fully aware of that fact?

A. Yes, sir.

Q. What other policy did Phinney tell you he had?

A. He did not name the policies, but he told me the amount of the insurance.

Q. Did not you state, on your former examination that he told you particularly about this policy that he had

in the Mutual Life for a hundred thousand dollars?

A. Yes.

Q. But he did not tell you the names of the other companies in which he held insurance?

A. If he did, I do not remember.

Q. But you do remember this particularly?

A. Yes; I remember now.

Q. How long after Mr. Phinney's death before you filed claims on the policies in the New York Life?

A. I cannot tell you the date, it was within a month.

Q. And he had ten thousand in another company, did he not? A. Yes, sir.

Q. You filed a claim against that company within a month? A. Yes, sir.

Q. The state of your health did not in any way prevent you filing claims against the other companies?

A. It was done by the agents.

Q. You had Mr. Young as your agent and Mr. Burleigh for your attorney?

A. Mr. Burleigh was not an agent at that time.

Q. When did he become an agent—Mr. Young, I mean? A. Not until October, 1893.

Q. Who was your agent prior to that?

A. Mr. Brenton. (Testimony of witness closed.)

DOUGLAS YOUNG, a witness called on behalf of the plaintiff, being first duly sworn, on oath testifies as follows:

Q. (By Mr. Warburton.) What is your residence and occupation? A. Seattle, Washington. Agent of the Phinney estate.

Q. How long have you been such.

A. Since January 1st, 1894.

Q. I hand you copies of two affidavits, and ask you if you ever saw the originals? A. I did; yes, sir.

(Identification F, referred to.)

Q. What did you do with that, if anything?

A. I wrote these affidavits, and had Mrs. Phinney execute the first and had W. W. Grass execute the second affidavit, and then mailed them by registered letter to office address of the Mutual Life Insurance Company of New York.

Q. Did you receive these receipts? (Identification C and H shown witness.)

A. Yes, sir, I received this receipt in the postoffice (H) at Seattle, and this receipt (G) from the Mutual Life Insurance Company of New York through the mail.

Q. Properly addressed and postage prepaid?

A. Yes, sir.

Cross-examination.

Q. (By Mr. Gilman.) When did you first become agent of Mrs. Phinney?

A. January 1st, 1894. My work dated from October 1, 1893. (Testimony of witness closed.)

Mr. Warburton.—I offer in evidence plaintiff's identification "F," "G" and "H."

Papers received without objection and marked plaintiff's Exhibits "F," "G," "H."

EXHIBIT "F."

State of Washington, }
County of King. } ss.

Nellie Phinney, being first duly sworn, on her oath, deposes and says that she is a resident of the city of Seattle

State of Washington. That in the month of May, 1893 affiant was married to one Guy C. Phinney, who was then a resident of Seattle, Washington, and who continued to be a resident of said city and State up to the time of his death, and said affiant continued to be the lawful wedded wife of said Guy C. Phinney up to the time of his death. That on or about the 24th day of September, 1890, the Mutual Life Insurance Co. of New York insured the life of said Guy C. Phinney, in the sum of one hundred thousand dollars. That on the 12th day of September, 1893, said Guy C. Phinney died in the city of Seattle, State of Washington. That said affiant is executrix of the estate of Guy C. Phinney.

NELLIE PHINNEY.

Subscribed and sworn to before me this 9th day of Aug., 1894.

T. W. GORDON,

County Clerk and Ex-officio Clerk of the Superior Court.

State of Washington, }
County of King. } ss.

W. W. Grass, being first duly sworn, on his oath, deposes and says that he is a resident of the city of Seattle, Washington, and has been for the past five years, that for several years prior to the death of Guy C. Phinney he was well acquainted with him; that said Guy C. Phinney was the husband of one Nellie Phinney, whose name is subscribed to the foregoing affidavit.

That on the 12th day of September, 1893, said Guy C. Phinney died in the city of Seattle, State of Washington. That affiant saw his dead body on and after said 12th day

of September, 1893, and on the 15th day of September, 1893, saw his dead body lowered into the grave.

W. W. GRASS.

Subscribed and sworn to before me this 28th day of Aug., 1894.

[Seal]

T. W. GORDON.

[Endorsements]: "Plaintiff's Exhibit 'F.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

EXHIBIT "G."

"Registry return receipt. Sent Aug. 28, 1894.

Reg. No. 5418. From Post Office at Seattle, Wash.

Reg. letter.

Reg. parcel. Addressed to Mut. Life Ins. Co.

Post Office at New York, N. Y.

After obtaining receipt below, the postmaster will mail this card, without cover and without postage, to address on the other side.

Received the above described registered letter. 20300

(Sender's name on other side. parcel.

Sign on dotted line to the right. When delivery is made to other than addressee, the name of both addressee and recipient must appear.	}	MUT. LIFE INS. CO., M.R. Hibbard
--	---	--

Erase letter or parcel, according to which is sent."
(on other side)

"When the registered letter or parcel accompanying this card is delivered, the postmaster will require signa-

v. Nellie Phinney, Executrix, etc.

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ture to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of \$300 is fixed by law for using this card for other than official business.

New York

Postoffice Department.

Sept. 4.

Official Business. Postoffice at 4 30 P. M.

94.

Return to

Name of sender, Douglass Young,

Street and number Agent.

Or. Post Office, Post office at Seattle, county of King, State of Washington.

[Endorsements]: "Plaintiff's Exhibit 'G,' filed July 25, 1895, in the U. S. Circuit Court, A. Reeves Ayres, Clerk, by R. M. Hopkins, Deputy."

EXHIBIT "H."

Registered (Letter) No. 5418, P. O., Seattle, Wash.

(Parcel)

Received Aug. 28, 1894, of Douglas Young, Agt., a (letter) addressed to Mut. Life Ins. Co. of N. Y., New York. N. (parcel).

G. DAVIES, P. M., Per T.

[Endorsed]: "Plaintiff's Exhibit 'H.' Filed July 26, 1895. A. Reeves Ayres, Clerk, R. M. Hopkins, Deputy."

Mr. Warburton. That is all, in chief.

At 12 o'clock, M., further hearing continued until 2 o'clock P. M., after the Court cautioned the jury as to their conduct during the recess and trial of the cause.

Afternoon session. Continuation of proceedings pursuant to adjournment at 2 o'clock.

Mr. Strudwick. If your Honor please, we desire to submit in behalf of the defendant at this stage of this case, a motion for a nonsuit. We base this motion on two grounds:

First. That the plaintiff has failed to establish the material allegation in her complaint that Phinney in his lifetime performed all the conditions of this contract, as to which there is an issue, and if waiver could be introduced there is no proof of waiver.

Second. It is alleged in the complaint, and denied in the answer, that Mrs. Phinney, the plaintiff, has performed all the conditions of this contract. We claim that no right of action accrued against this defendant until she had tendered the amounts which according to the contract were due for the two unpaid premiums.

Motion for nonsuit denied; exception allowed to defendant.

Mrs. Nellie Phinney recalled for cross-examination.

Q. (By *Mr. Gilman.*) Mrs. Phinney, the fifty thousand dollars on your husband's life was payable to yourself?

A. It was.

Q. And the ten thousand dollars was payable to the children? A. To the children.

Q. Neither one of these policies belonged to the estate? A. No, sir.

(Testimony of witness closed.)

Defendant's Testimony.

ANDREW B. FORBES, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By Mr. Gilman.) Where do you reside?

A. San Francisco.

Q. What is your business, Mr. Forbes?

A. I am an insurance agent and general agent of the Mutual Life Insurance Company of New York.

Q. General agent of the defendant in this action?

A. Yes, sir.

Q. For what territory?

A. At this time for California, Nevada, and the Sandwich Islands since the first of January last.

Q. During the years 1890-1891-2-3, what territory did your agency comprise?

A. It comprised Arizona as well as California, Nevada, Oregon, Washington, and Idaho, Montana, and British Columbia.

Q. Washington and Oregon were included in that territory? A. They were.

Q. You were the head of the company's business in the territory that you have mentioned?

A. Yes, sir.

Q. Did you divide this agency into subagencies?

A. I did.

Q. In what subagency was Washington?

A. Washington was under the control of F. L. Stinson, combining Oregon and Washington together.

Q. Was there any written agreement defining Mr. Stinson's authority?

A. I think that Mr. Stinson had printed instructions.

Q. Do you know whether or not he also held an appointment from the company itself.

A. He did.

Q. What was Stinson's designation as agent of the company?

A. He was State general agent for Washington and Oregon.

Q. Now, your authority, as I understand it, emanated directly from the company? A. It did.

Q. Did you have authority from the company to appoint subagents?

A. Of course, it was my province to have that.

Q. Who had charge and management of the affairs of the Mutual Life Insurance Company in the State of Washington during the years 1890, 1891-2-3?

A. Mr. Stinson.

Q. Now, do you know of a certain policy which is sued on in this action, No. 422198, for one hundred thousand dollars on the life of G. C. Phinney?

A. Yes, sir.

Q. Was there an application made by Phinney for that policy? A. There was.

Q. Will you state, if you please, the course that the application took?

A. The application was forwarded by Mr. Stinson to my agency, where he returned all these things, and then it was forwarded by me to the company in New York.

Q. Now, was a policy issued upon that application?

A. There was a policy issued upon the application.

Q. What course did the policy take?

A. The policy was sent out to me, and was forwarded to Mr. Stinson.

Q. Here at Seattle?

A. At Seattle for delivery.

Q. Do you know how many premiums were paid on this policy?

A. Only one. That was the first premium.

Cross-Examination.

Q. (By Mr. Warburton.) Mr. Forbes, you are the party whose deposition was taken some time ago in San Francisco?

A. Yes, sir.

Q. You say that Mr. Stinson received no direct appointment from the company?

A. He did receive an appointment direct from the company.

Q. Who gave him that appointment—who signed that appointment?

A. It was signed by the officers of the company.

Q. McCurdy?

A. I do not know whether McCurdy or not. I think it was the secretary.

Mr. Strudwick. It was signed by Lloyd, second vice-president.

Mr. Warburton. It was one of the executive officers of the company.

Q. What authority did Mr. Stinson have as agent?

A. Well, he had powers under that to accept service

of suit. He had powers as subagent and State general agent to receive applications. To receive premiums, receipts, and payments on them, and report them to me.

Q. That was his full limit of authority, was it?

A. It was his authority.

Q. Didn't have anything in excess of that?

A. Well, that embraces most all there is connected with the business. In that would be involved all the necessary minor details of the business that would come up just the same as if he were acting for myself or for the company.

Q. You say that his authority is in writing—this is the appointment that you have referred to?

A. Yes, sir.

Defendant's counsel moves to strike out the testimony of the witness in reference to the powers of Mr. Stinson, except as designated in this written instrument.

Motion denied. Exception allowed.

(Paper identified as Defendant's Exhibit 1.)

Q. This was all the authority he had from the company, except through you?

A. Yes, sir; except through me.

Q. You say that he had authority in addition to accepting applications and accepting premiums?

A. Yes, sir.

Q. He did have additional authority?

A. Yes, sir.

Q. I will ask you, Mr. Forbes, if in the deposition that you have already sworn to, if the following question was not asked you, "What relation, if any, existed between F. L. Stinson, of Seattle, Washington, and the said Mu-

tual Life Insurance Company of New York?" and I will ask you if you did not make the following reply thereto: "He had authority to solicit life insurance for the Mutual Life Insurance Company of New York; to collect premiums, but not to extend time for payment of premiums; and to report and remit the same to me at the general agency. He was appointed by me, but had no written authority, as I recollect." This is all true, is it?

A. Not from myself.

Q. "I have not been able to find any written appointment or copy of the same." A. Yes, sir.

Redirect Examination.

Q. (By Mr. Gilman.) Mr. Forbes, who generally had charge of all the business of the company in the State of Washington during the period that I have mentioned? A. Mr. Stinson.

Q. Did you have authority to appoint such an agent from the company?

A. Yes, sir; I think my powers registered would somehow. The company understood all my appointments, and were acquainted with all my appointments of that kind.

Q. The appointment of Stinson was reported to the head office? A. It was.

Q. Ratified by them? A. It was.

Q. Did they know of his appointment?

A. Oh, yes.

Q. As I understand you, so far as concerns the business of life insurance of this company in this State, he had charge of it? A. He did.

Recross-Examination.

Q. (By Mr. Warburton.) You say only one payment of premium was made? A. Only one premium.

Q. How do you know that?

A. That was reported to me.

Q. You don't know anything about it except that it was not paid to you? A. That is all.

Q. Mr. Stinson had power to receive premiums, did he not?

A. Oh, yes; he had power to receive them, but it was his duty to report them.

Q. It may have been his duty, but he might have accepted them and not reported it. A. Possibly.

Q. Then you know nothing about it except what he told you? A. Yes, sir.

Q. You say the company was advised of Stinson's appointment? A. Yes, sir.

Q. The company knew all about it?

A. Of course they did. I think in New York I had my first conversation with Stinson, and appointed him there.

Q. Was McCurdy there at that time?

A. McCurdy was not there.

Q. Was Easton around about that time?

A. No.

Q. Easton didn't know anything about it?

A. I don't know whether he did or not. Easton was not the person that I dealt with; I dealt with Lloyd.

Q. He was secretary as early as 1888?

A. I think so.

v. Nellie Phinney, Executrix, etc.

Q. McCurdy was president as early as 1888?

A. Yes, sir.

Q. And Duncan was corresponding secretary; he ought to know about it?

A. I do not think Duncan was in the service as corresponding secretary at that time.

Q. Even earlier than 1890, was he not?

A. He might be.

Q. That was at the time the policy was issued?

A. I am speaking of the time that I appointed Mr. Stinson in New York.

Redirect Examination.

Q. (By Mr. Gilman.) Mr. Forbes, I suppose the business of the Mutual Life is divided into different departments?

A. Yes, sir.

Q. Mr. McCurdy don't have the superintending of the agency, does he? A. Not at all.

Q. Who is that done by?

A. Generally done by the second vice-president and general manager.

Q. I wish you would state to the jury, Mr. Forbes, the general course of the business of the collection of premiums of the Mutual Life at that time?

A. We have sent us the renewal receipts from New York. They are sent in advance, so that we can record them and forward to the different agencies. These premiums are due on the day as stated, and if they are not paid, we receive no statement from them; we note it on our book. Then we write to the subagency, like Mr. Stinson or Mr. Wheaton in Montana, and notify them to re-

turn these renewal receipts to us, and when they come back we forward them to New York, and we note on our account that they are not paid.

Q. Now, was the renewal receipt for Phinney's second year's premium—that is, the premium of 1891—sent from New York to you? A. It was.

Q. What did you do with it?

A. I forwarded it to Mr. Stinson.

Q. What became of it then, if you know?

A. Mr. Stinson's account came down and it was unpaid, and not reported as paid, and we wrote up as usual to have these receipts returned, and he returned that receipt to us with others.

Q. The Phinney receipt was returned?

A. The Phinney receipt was returned.

Q. What is done by the agent with the receipt if the premium is paid?

A. He gives it to the person who pays the premium.

~~Q. This receipt was returned to you?~~

A. This receipt was returned to me.

Q. And you returned it to New York?

A. I forwarded it to New York.

Recross Examination.

Q. By Mr. Warburton.—Was the report of this premium being unpaid and the return of this receipt accompanied by a letter?

A. I think all our reports are with a statement that goes to each department.

Q. Have you got that letter here?

A. I have not. It is merely forwarded to us among premium receipts in a printed form and returned.

Q. Have you got the letter returning the premium receipt? A. It was returned with many others.

Defendant's counsel produces letter dated November 26.

Q. I show you this letter.

A. This is the letter from Mr. Stinson.

Q. This is Stinson's signature?

A. This is Stinson's signature.

Paper marked Plaintiff's Exhibit "K" for identification.)

Q. What is this paper?

A. This is a communication from F. L. Stinson.

(Paper marked Plaintiff's Exhibit "K" for identification.)

Q. You say a letter of Stinson's came with the application? A. Yes, sir.

Q. Was there a policy issued on that application?

A. Yes, sir.

Q. Was it issued on the plan asked for in that application? A. No, sir.

Q. How did it come it was not issued on the plan asked for? A. Well, we received—

Objected to by defendant's counsel as immaterial. Objection sustained on the ground it is not proper cross-examination.

(Testimony of witness closed.)

F. L. STINSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Defendant offers in evidence certified copy of the appointment of M. L. Stinson as agent of the defendant in this action from the office of Secretary of State of this State, under the great seal of the State, which has been heretofore identified as defendant's Exhibit "1."

Paper admitted in evidence without objection, and marked defendant's Exhibit "1."

DEFENDANT'S EXHIBIT "1."

"United States of America. State of Washington.
Office of the Secretary of State.

I, J. H. Price, Secretary of State of the State of Washington, and ex-officio insurance commissioner, do hereby certify that I have carefully compared the annexed copy of the appointment of Fred L. Stinson, agent for the Mutual Life Insurance Company of New York, with the original now on file in this office, and find the same to be a true and perfect copy thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State of Washington. Done at Olympia, this 23d day of July, in the year of our Lord one thousand eight hundred and ninety-five.

J. H. PRICE,

Secretary of State and Ins. Com.

(The seal of the State of Washington, 1889.)

"Know all men by these presents, that pursuant to the requirements of section 10 of the Insurance Law of the State of Washington, The Mutual Life Insurance Company of New York, a corporation formed under the laws of the State of New York, and carrying on the business of life insurance in the State of Washington, has constituted

and appointed, and by these presents does constitute and appoint, Fred L. Stinson, of Seattle, its general agent in said State of Washington.

That said Fred L. Stinson, so appointed as aforesaid, is the principal agent or chief manager of the business of the said The Mutual Life Insurance Company of New York, in said State of Washington, on whom summons and other process may be served in any action or other legal proceeding against said corporation.

And the said The Mutual Life Insurance Company of New York hereby stipulates and agrees that in consideration of the permission granted by the State of Washington to said The Mutual Life Insurance Company of New York to transact insurance business in said State, that if at any time said company shall be without an agent in the State of Washington, on whom summons or other legal process may be served, service of said summons or other legal process may be made upon the insurance commissioner, such service upon the commissioner to have the same force and effect as if made upon said company.

In witness whereof, the said company has to these presents affixed its corporate seal, and caused the same to be subscribed and attested by its 2d vice-president and secretary, at New York City, State of New York, on the 16th day of April, A. D. 1891.

ISAAC F. LLOYD, 2d Vice-President.

W. J. EASTON, Secretary.

[Corporate Seal]

State of New York,
City and County of New York. } ss.

On this sixteenth day of April, A. D. 1891, before me, the subscriber, a commissioner duly appointed to take proof and acknowledgment of deeds and other instruments, came Isaac F. Lloyd, 2d vicepresident, and W. J. Easton, secretary of the Mutual Life Insurance Company of New York, to me personally known to be the individuals described in and who executed the preceding instrument; and they duly acknowledged the execution of the same; and being by me each duly sworn, severally and each for himself, deposes and says that they are the said officers of the insurance company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of the said company; and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation as and for the act and deed of said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal at New York City on the day and year first above written.

[Commissioner's Seal] CHARLES NETTLETON

Commissioner for Washington in New York.

[Endorsed]: The Mutual Life Insurance Company of New York to Fred L. Stinson. Appointment of agent. Approved as to form, William G. Davies. Filed May 7, 1891. Allen Wier, Ins. Comr.

[Endorsed]: "Defendant's Exhibit 1. Filed July 25,

1895, in the U. S. Circuit Court. A. Reeves Ayres. By R. M. Hopkins, Deputy.

Q. By Mr. Gilman.—Where do you reside?

A. Seattle, Washington.

Q. And in what business are you engaged?

A. Engaged in the life insurance business.

Q. For what company?

A. The Manhattan Life.

Q. Did you at any time ever have any relations with this defendant? A. I have; yes, sir.

Q. During what period?

A. From 1889 and till the latter part of 1893.

Q. Now, what was your relation with the defendant during that period—if you had any different relations during the different parts of the period, state so.

A. For a year I was acting as special agent for Mr. Forbes. Then I was appointed State agent for Washington and Oregon.

Q. That appointment was made at the time this power was filed?

A. At or about that time; yes, sir.

Q. That was the 16th day of April, 1891. During the period from 1889 to the latter part of 1893, who had charge and management of the business of this defendant in the State of Washington? A. I did.

Q. Did they have any other representative here except such as held under you? A. No, sir.

Q. Did you know Guy C. Phinney in his lifetime?

A. I did.

Q. As agent of the defendant, did you have any trans-

action with him in reference to issuing a policy of insurance on his life? A. I did.

Q. When was that?

A. That was in September, 1890.

Q. Now, you may state what occurred between you.

A. I solicited Phinney for insurance and finally wrote his application for one hundred thousand dollars. I think it was September 22nd that I wrote the application, and he was examined I think the next day. The application and the examination was forwarded to Mr. Forbes at San Francisco, and in due course I received the policy.

Q. From what source did you receive the policy?

A. From San Francisco, Mr. Forbes.

Q. Was that the general course that all your applications and policies took, namely, from yourself to Mr. Forbes in San Francisco and from Mr. Forbes to the company in New York, and returned from New York to San Francisco, and San Francisco to you?

A. Yes, sir, in all cases.

Q. And where do you state this application was written?

A. At Mr. Phinney's office, I think, at Seattle.

Q. Upon the return of the policy was it delivered to Mr. Phinney? A. Yes, sir.

Q. By whom? A. By myself.

Q. Where? A. I am very sure at his office.

Q. That was in Seattle?

A. Seattle, Washington.

Q. Did Mr. Phinney pay you the first year's premium?

A. He did.

Q. Where was that premium paid?

A. Well, he settled for it at his office—it was paid at different places.

Q. The premium was not all paid at one time?

A. No, sir.

Q. But all the payments that were made were made in Seattle? A. Yes, sir.

Q. Now, what was the course of business of the company at that time in reference to the collection of renewals upon policies, that is, second and subsequent—that is, the premiums of second and subsequent years?

A. I received a monthly statement from Mr. Forbes inclosing the renewal receipts due that month. They were forwarded to me and by me collected, and the proceeds remitted to Mr. Forbes.

Q. What was done with the renewal receipts when the premium was collected?

A. They were given to the insured.

Q. And in case of their not being collected?

A. Returned to Mr. Forbes.

Q. Now, the second premium of Mr. Phinney became due September 24, 1891. State whether or not you sent out notices to the different policy holders.

A. Yes, sir.

Q. Was any other notice sent out?

A. Mr. Forbes sent a notice from San Francisco as well.

Q. Now, in the case of Mr. Phinney, was such notice sent by you, that is, before the second year's premium matured?

A. I presume it was. I sent them to all the policy holders.

Q. What did Phinney do in response to that notice, if anything?

A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company, and asked me if I could not take his notes for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company, and they would take only cash. I think a few days before it was due, perhaps three or four days. I met him again and we had a similar conversation, and I told him about the same again, that I was unable to carry his notes; that I did not have the cash to put up to the company.

Q. Did he ever make payment of that premium to you? A. Not to me; no, sir.

Q. Who else in this State was authorized to receive and collect premiums? A. No one.

Q. Now, did the time limited for the payment of premium—that expired without the payment of the premium, I understand.

Objected to by plaintiff's counsel as calling for a conclusion.

The Court. That is an unimportant question.

Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due and was unpaid, with reference to this particular premium?

A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten days, I should say—between one and two weeks after it was due—he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it, and he then told me that he was prepared to pay the premium.

Q. What did he ask you to do?

Objected to as leading by plaintiff's counsel.

Q. What, if anything, did he ask you to do?

Objection overruled; exception allowed.

A. He told me if I would bring the renewal receipts, or words to that effect, that he would pay the premium.

Q. State what occurred between you—what you said to him and what he said to you.

A. I told him that I could not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank. I am not positive about that. He told me that he did not think that he could pass for a certificate of health, from the fact that he had been rejected by the Equitable a few days before.

Q. Now, were any steps taken by you, or by Mr. Phinney, to your knowledge, to ascertain whether or not he could obtain a certificate of health?

A. I saw Dr. Eagleson, the company's medical examiner and requested him to examine Mr. Phinney and furnish a certificate of health. He told me that he had examined him recently for the Equitable, and that they had refused the policy, and it would be useless to try to pass him for the reinstatement.

Q. You had the renewal receipt at that time in your possession? A. Yes, sir.

Q. What was done with that?

A. I returned it to Mr. Forbes.

Q. I will ask you whether or not Mr. Phinney at any time presented you the money for this premium?

A. No; he did not.

Q. Well, was there any further transaction between you and Mr. Phinney with reference to this insurance or the policy?

A. We had, I think, several conversations after that in a general way. I think it was in December, possibly January following, I was in Mr. Phinney's office and we got to talking about insurance, and the subject of his policy came up, and I requested him to let me have the policy to use for canvassing purposes, and he stated the same having lapsed he had no further use for it, and I could take it if I wanted it.

Q. Did you take it?

A. I took it at that time, as near as I can remember.

Q. Do you remember whether or not you did use it for canvassing purposes?

A. I do not remember that particular policy; I had several in large amounts—I don't know whether I used it or not.

Q. I will ask you whether or not it was customary in your business where policies have been lapsed to get the policy?

A. Well, I did it in large policies.

Q. You were still the agent of the company, I think you said, until the latter part of 1893?

A. Yes, sir.

Q. State whether or not the premium of 1892 was paid or tendered? A. Not to me.

Q. Now, until you left the service of the company in the latter part of 1893, I will ask you whether or not any claim was made by Mrs. Phinney to you regarding that policy? A. Not to me.

Q. I will ask you whether or not she or anybody representing her ever made any inquiry regarding it?

A. Not to me.

Q. After you received this policy, this conversation between yourself and Mr. Phinney, I will ask you whether or not Mr. Phinney ever made any claim that this policy was not lapsed? A. No.

Cross-Examination.

Q. (By Mr. Warburton.) When did you say this policy was delivered to Mr. Phinney?

A. Some time in October, 1890.

Q. The 31st of October?

A. Well, I do not recollect the date. It was from four to six weeks after the application was written.

Q. Are there any records in the city whereby you could ascertain the exact date? A. No, sir.

Q. Was it as early as the 28th of October?

A. Well, I can only remember in a general way. It usually took four to six weeks to get these policies, and I would say inside of six weeks.

Q. Maybe I can refresh your memory. You had con-

siderable correspondence with the company with reference to a change from ordinary life to twenty-pay life?

Objected to by defendant's counsel as immaterial.

Objection overruled. Exception allowed.

A. I had some correspondence.

Q. Did you receive a telegram from the company stating this policy had been issued on a certain date?

A. From Mr. Forbes.

Q. What date was that telegram, do you recollect?

A. No.

Q. Did you not on the 21st day of October, 1890, receive the following telegram from Mr. Forbes: "F. L. Stinson, Safe Deposit Building. Heilbron policy issued. Will write Phinney on twenty-year life—Baxter twenty-year endowment. Shall I order policies Phinney and Baxter?"

A. I received a telegram to that effect.

Q. Now, that was on October 21st, was it not?

A. Well, I presume so. I do not remember the exact date.

Q. Now, on October 21st, did you not receive the following letter from A. B. Forbes: "F. L. Stinson, I inclose copy of my telegram to you of this day. It is Co.'s best offer, and I trust we will receive your order for Phinney and Baxter policies. The writer wired home office this P. M. to forward the three policies, and will do our best to deliver the same?"

Objected to by defendant's counsel as immaterial.

Q. It would take about ten days in the ordinary course to get that policy from New York?

A. About ten to twelve days.

Q. It would be here about the first of November?

A. About that.

Q. Is it not your best recollection that the policy was delivered on or about the first day of November?

A. I should consider it would be about that time.

Q. Now, you have said that you saw Mr. Phinney a few days before this policy matured, in 1891—the premiums you claim—and had a talk with him about it, and he said he was anxious for you to take his notes, and you informed him you could not take his notes?

A. Yes, sir.

Q. When was the next time you saw him?

A. Well, I saw him so often that I could not fix any particular date, within a few days.

Q. What did you tell him the next time you saw him?

A. In reply to his answer I told him—

Q. What was the conversation between you and Mr. Phinney the first time you saw him after the premium was due?

A. It was to this effect, that he asked me to take his notes in lieu of cash, and deliver him the company's receipt.

Q. What did you say?

A. I told him I could not accept his notes, as I had to pay cash to the company, and I didn't have it.

Q. You told him it would be necessary to get cash?

A. Yes, sir.

Q. Before you delivered the receipts?

A. Yes, sir.

Q. When was the next time you saw him?

A. Within a week or ten days, I should think.

Q. What was the conversation then?

A. It was about to the same effect as the first.

Q. Now, later on you went up to borrow this policy of Phinney—went up to his office to borrow his policy?

A. I don't know that I went to his office for that purpose. It came up in the general conversation.

Q. You did borrow it there? A. Yes, sir.

Q. Now, just going back, you say finally he told you he was ready to pay the premium? A. Yes, sir.

Q. What did you tell him?

A. I told him that I could not accept the premium without a certificate of health.

Q. That the policy was forfeited?

A. That the policy was forfeited.

Q. Lapsed? A. Lapsed.

Q. And you could not accept it? Now, you wrote the company that he had tendered the premium, didn't you?

A. Yes, sir.

Q. You understand that was a good tender, didn't you? A. Yes, sir.

Defendant moves to strike out the answer of the witness as to what he understood.

Motion sustained.

Q. You understood Phinney was ready to pay—he said so? A. Yes, sir.

Q. You told him you could not accept it, because he was in ill health? A. Yes, sir.

Q. You say later on you went to the office and borrowed this policy? A. Yes, sir.

Q. You told him it was forfeited and it was not any good to him, or words to that effect?

- A. Words to that effect; yes, sir.
- Q. And you were well acquainted with Phinney?
- A. Yes, sir.
- Q. And a good friend of yours?
- A. Yes, sir.
- Q. Now, you didn't mean to tell him an untruth?
- A. No, sir.
- Q. You know now that it was not true, don't you?
- A. What?
- Q. That the policy was not forfeited, but you thought it was forfeited, but, as a matter of fact, it was not forfeited at that time.

Defendant objects as calling for a conclusion of law.

Objection sustained. Exception allowed.

- Q. Well, Phinney permitted you to take the policy?
- A. Yes, sir.
- Q. Did you ever return it to him?
- A. Not to my knowledge. I don't remember that I did.
- Q. Are you sure you got it—that he loaned it to you?
- A. Yes. I am sure as I could be of anything that happened at that time.
- Q. What became of this policy?
- A. I don't know.
- Q. You haven't got it now. A. No.
- Q. You say Phinney let you have this policy for canvassing purposes? A. Yes, sir.
- Q. You asked him for it for that purpose?
- A. Yes, sir.

Q. Now, you would not care to have a dead policy for canvassing purposes, would you?

A. It would not make any difference whether it was dead or alive.

Q. You would not want to say that Phinney had a policy issued for a hundred thousand, and it was such an expensive contract—

A. That is part I should not state if I was canvassing. I should show the contract.

Q. For the purpose of soliciting you would let them understand it was a live policy? A. Yes, sir.

Q. Now, you are not quite sure the date that Phinney paid you this money?

A. The first premium?

Q. Yes. A. No, sir; I am not.

Q. Cannot you in any manner state what date that was? Haven't you got any memorandum by which you can arrive at the date?

A. Well, I have got some memorandum regarding the payment. It is somewhat scattered. He gave his notes and other payments.

Q. What date do these notes bear?

A. There were two dated October 22nd, and one September 23rd, if I remember correctly.

Q. For how much?

A. The aggregate was eight hundred and eight dollars.

Q. How does it come the notes were dated on different dates?

A. I don't know. The entry is not made in my hand-

writing. It was made by one of the clerks, and I don't know how this is.

Q. How did Phinney pay this premium?

Objected to by defendant as immaterial.

Objection overruled. Exception allowed.

A. He gave some cash, and gave his notes for eight hundred and eight dollars, and a deed for some property.

Q. What cash did he give you?

A. I do not remember.

Q. Do you know the amount in cash? A. No.

Q. Did you deposit it in the bank?

A. I presume I did.

Q. Cannot you show on what date?

A. I haven't looked it up.

Q. Cannot you find out how much it was?

A. I might.

Q. State whether or not Phinney paid you two premiums in advance? A. He did not.

Q. Did not he pay you three premiums in advance?

A. No.

Q. How much cash do you think he paid?

A. Well, I don't remember.

Q. Can you give me an idea about it?

A. I found one entry. I looked over my books carefully last night to refresh my memory, and I found one entry in October, two hundred dollars cash, G. C. Phinney.

Q. That was October, when?

A. October, 1890; I forget the date. It is October. It is on account of this premium.

Q. Two hundred dollars? A. Yes, sir.

Q. Now, what was this deed to this property that you have spoken of?

A. It was a deed to me from Herman Chapin, vice-president of the Boston National Bank, six hundred dollars.

Q. You owed Phinney a note and mortgage of about fourteen hundred dollars at that time?

A. I do not remember whether that was paid at that time or not. It was subsequently paid.

Q. Do you remember at the time that was due?

A. No; I do not.

Q. I will ask you if that is the note and mortgage (showing paper to witness).

A. I think it is; yes, sir.

Q. Now, was not that in part payment of this policy?

A. It was not.

Q. Did not you state to Mr. Jones very recently that it was? A. I did not.

Q. You notice that this mortgage was due on the 23rd of October, do you not?

A. About that time.

Q. That was the date of the mortgage, was it not? Well, now, on this very day that this mortgage was due, how does it come that Mr. Phinney gave you a note due in three months for three hundred and fifty dollars, and you owed him fourteen hundred and forty dollars on that date?

A. Mr. Phinney owed me for the life insurance premium, and I owed Mr. Phinney a balance on some property in Lake Union Addition for which this mortgage was

given in part payment. I paid that mortgage to the Boston National Bank; I think the note and mortgage are hypothecated by Phinney at the Boston National Bank, and it was paid there, if I remember correctly, and there were two distinct, separate transactions.

Q. You would pay that by check would you not?

A. I don't know whether I would or not.

Q. Would you pay so large an amount as that in cash to the Boston National Bank?

A. I presume I would pay it by check. I think I have the check.

Q. Can you furnish that check?

A. I think I can. Yes, sir.

Q. Now, Mr. Stinson, this mortgage is satisfied November 1, 1890?

A. Apparently, yes.

Q. That is about the time the policy was delivered, was it not?

A. Very near.

Q. Probably the same day? Was it not, or the day after?

A. Very near; I don't know as to that.

Q. You owed Phinney another mortgage, did you not?

A. There were two other gentlemen and myself bought some blocks of Phinney, and it was made out in my name. I gave a mortgage and took papers from the other two gentlemen, if that is what you refer to.

Q. You notice that Guy C. Phinney satisfied this fourteen hundred dollar mortgage on the first day of November?

A. I noticed something to that effect.

Q. This other mortgage that you owed Guy C. Phinney, you are the maker of that mortgage are you not?

A. I think so.

Q. That is for twenty-five hundred dollars, is it not?

A. I think I gave him a note and mortgage of that kind.

Q. That was at the time, October 28, 1889, was it not? That is the date of it?

A. Somewheres along there.

Q. That was dated October 28, 1890?

A. I bought some property from Phinney in September, 1890, and some in October, 1889, and I gave mortgages in both cases, and they are both paid.

Q. One of these mortgages I have just called attention to was to E. P. Ferry, and assigned to Phinney?

A. I think so.

Q. The fourteen hundred dollar one?

A. I think so; yes, sir.

Q. And the other twenty-five hundred dollars you made direct to Mr. Phinney? This was also satisfied of record on November 1, 1890?

A. I don't know as to that. I do not remember.

Q. Probably this will refresh your memory (showing paper to witness).

A. Well, I could only say in a general way. I presume that is correct.

Q. Both of these mortgages were satisfied the same day. Now, on October 22, Mr. Phinney gave you his note, which you took, for five hundred dollars, and both of these mortgages almost matured; is that right?

A. It might have been.

Q. And then you gave him another October 23rd, the

same day this other mortgage was due, for three hundred and fifty dollars, when you owed him on that day fourteen hundred and forty dollars; is that true?

A. It might have been.

Q. How would that occur? Would you take his note when you were paying him and he had fourteen hundred dollars of your money?

A. Phinney had hypothecated the notes so that they were no good to me. They were in Boston National Bank.

Q. You would pay a large amount as this by check?

A. Yes, sir.

Q. Can you get that check?

A. Yes, sir; I will get it if you want it.

Q. I do want it. Did you ever receive any other money than the two hundred dollars and the six hundred dollars in lots?

A. His notes were eventually paid.

Q. When were these notes paid?

A. They were not paid when due.

Q. How long after due?

A. Well, I think one of them ran about a year and a half.

Q. When was the first one due?

A. I think in sixty days.

Q. When was that paid? A. I could not say.

Q. Was it paid as early as February?

A. Perhaps so.

Q. Was it paid as early as January?

A. I have no means of recollecting the dates these

were paid along, and the last one ran about a year and a half.

Q. This was delivered on November 1st. Did he pay anything in December?

A. Not that I remember.

Q. Did he pay you any in May, 1891?

A. He might have.

Q. Was that in payment of premium? (Showing paper to witness.)

A. That was.

Q. \$359—that was paid in December, was it not?

A. Yes, sir.

Q. That was not on either of these notes—the two or three notes you have mentioned. This was paid before these notes matured?

A. I could not tell without looking at the notes. The note dated September 23rd I forgot the length of time it ran for. I can tell by getting the books.

Q. And you can get these checks for these mortgages?

A. I can get what checks passed between us regarding that property.

Q. I would like to have you get your checks.

A. All right, sir.

Q. You say that you did not tell Mr. Jones here two or three months back—a month or two back—that this first mortgage was in part payment of the premium—the first premium?

A. No; I did not.

Q. You had a talk with Jones, did you not?

A. Mr. Jones and I mentioned the case several times.

Q. You recollect the time? A. No.

Q. Well, now, at either of these conversations, or any

of them, that you had with Jones in the last two or three months, you did not tell Mr. Jones that either one of these mortgages was paid in part payment of the premium?

A. I did not; no, sir.

Q. Was anybody present when you had these conversations with Mr. Jones? A. I do not think so.

Q. How much discount, Mr. Stinson, did you make on this first premium? A. Quite a liberal one.

Q. Well, state how much.

A. Mr. Phinney was an insurance agent, I believe, some time, and I allowed him the regular commission.

Q. I would like to know the amount, the rebate?

A. I don't care to answer that question unless I have to. I don't care to state the commission.

Objected to as immaterial.

Objection sustained, for the reason that it is not proper cross-examination. Exception allowed.

Q. How much did it take to pay the first premium?

Objected to by defendant as immaterial.

Objection overruled. Exception allowed.

The Court.—I think defendant's counsel asked if the witness knew of the first premium being paid. I will allow the question.

Q. How much was the rebate?

A. I do not remember the exact amount.

Q. Well, as near as you can recollect.

A. I think I allowed him forty per cent off.

Q. Now, that was the original. Now, on the original plan he asked for a twenty year life, didn't he?

A. I think not; no, sir.

Q. I mean straight life. A. Ordinary.

Defendant objects for the same reason.

Objection overruled. Exception allowed.

Q. What was the amount of ordinary pay life, when he applied for it?

A. That applied to the premium as paid, \$3,770.

Q. What would it be on straight ordinary life as he originally applied for it, not the second application?

A. You mean what would be the premium?

Q. Yes, sir; on the original application?

A. It would be about five hundred dollars less, I guess.

Q. It would be three thousand dollars, would it not?

A. It is a little more.

Q. How much more? You are an insurance agent, you can tell exactly from his age? A. Yes, sir.

Q. Please tell me. His age is 38.

A. It would be just exactly three thousand dollars.

Q. Forty per cent of that would be twelve hundred dollars? Yes, sir.

Q. Now, you first figured on that basis in paying the premiums, did you not, and took your notes on that basis?

A. If I took any notes at that time—I don't know whether I did or not.

Q. You took notes on October 22, for five hundred dollars, did you not?

A. I think on October 22; yes.

Q. You just stated heretofore that that five hundred dollar note was dated September 22.

A. No; I said two notes were dated October 23, and one September 22.

Mr. Warburton. There are certain matters that I would like to be permitted to cross-examine the witness on after he gets his books and papers.

Q. You are not sure whether these notes were on September 22, the two notes for two hundred and fifty dollars each.

A. No, I am not positive.

Q. Now, cannot you refresh your recollection that about October 22, the company in New York refused to issue upon a straight life, and asked a twenty-year endowment, and that after some considerable dickering with Phinney, you finally agreed that he should accept a twenty-pay life; is not that true?

Objected to by defendant as immaterial.

Objection sustained. Exception allowed.

Q. Was this check for part payment?

A. Yes, sir.

Q. Was that check payment of one of these notes?

A. I think it is part payment.

Paper identified by the witness marked plaintiff's Exhibit "M," for identification.

Q. I show you this check and ask if it was in payment of premium.

A. I think that is on account of one of the notes that he gave; yes.

Paper identified by the witness marked plaintiff's Exhibit "N," for identification.

Check dated December 3, 1890, for \$359.20, heretofore

identified, marked plaintiff's Exhibit "O," for identification.

Plaintiff offers in evidence identification "M," "N," "O."

The Court. You can offer them at the proper time in your own testimony.

Mr. Warburton. We desire to recall the witness for further cross-examination.

The Court. I will let you recall him later on.

Redirect Examination.

Q. (By Mr. Gilman.) Did you have several real estate transactions with Mr. Phinney? A. Yes, sir.

Q. I will ask you whether or not in the year 1889 and '90, you dealt in real estate? A. Yes, sir.

Q. You may state what real estate deals with Mr. Phinney entered into this consideration for this policy.

A. Several lots in Phinney's Supplemental Park—I think it is Woodland Park Addition. Four lots in Block 64, Supplemental Plat of Woodland Park Addition.

Q. Now, this mortgage for twenty-five hundred dollars, made on the 28th day of October, 1889, you recollect how long a time that had to run?

A. I only had the deed. I gave so much cash, and gave a mortgage on this same property.

Q. Do you recollect of paying it?

A. I think I paid it all at one time to Chapin, of the Boston National Bank.

Q. That was also true of the fourteen hundred dollar mortgage? A. Yes, sir.

Q. I will ask you whether or not these mortgages entered in any way into this insurance contract?

A. It did not; no, sir.

Q. Now, at the time this policy was surrendered to you—counsel spoke of it having been borrowed—was there any understanding it should be returned?

A. No, sir.

Q. Was there any understanding between you and Phinney, as to what the state of the policy was at that time, whether alive or dead?

A. He stated to me that the policy had lapsed, it was no good to him; take it if I wanted it. That is the conversation as near as I can recollect it.

Q. Now, I will ask you as to the course of business in reference to renewals. These premiums paid subsequent to the first premium. Can the agent allow any discount on these? A. On the renewals.

Q. Yes.

A. Only except out of his own pocket. He can give it away if he wants to.

Q. The renewals you have to return pretty nearly the full amount to the company?

A. Yes, there is nothing in them, practically.

Q. (By Mr. Warburton.) Mr. Stinson, you are not any longer an agent of the company?

A. What company?

Q. The Mutual Life Insurance Company of New York?

A. No, sir.

Q. You are heavily indebted to the company, or to the general manager of the company?

Objected to by counsel for defendant as not proper

cross-examination. Objection sustained. Exception allowed.

(Testimony of witness closed.)

WILLIAM S. POND, witness called on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By Mr. Gilman. You reside in Seattle?

A. In Seattle, Washington.

Q. And what is your business?

A. I am at present the general agent of the Mutual Life Insurance Company of New York.

Q. What territory does your agency cover?

A. Washington, Oregon, and British Columbia.

Q. How long have you held that position?

A. Since the first of January, 1895.

Q. Were you connected with the company before that time?

A. Before that I was a representative of Mr. Forbes, of San Francisco.

Q. What I want to get at is this, did you assume Stinson's position at the time he left it?

A. Yes, sir; I assumed it as manager for Forbes, and in the first of this year I was appointed the general agent direct from New York.

Q. So that since Stinson left the company you have been its head in this state? A. Yes, sir.

Q. And that was in the latter part of 1893 that you assumed that position?

A. Well, in November, 1893, I came here as cashier for Mr. Forbes, and it was after Mr. Stinson was discontinued that I became manager.

Q. Now, during the time that you have had charge of the business of the company in this state up to July, 1894, what, if any, claim was made by Mrs. Phinney to you upon the policy now in suit?

A. There was no claim made until an inquiry was made in July, 1894.

Q. Who made that inquiry?

A. The first inquiry came by telephone. I could not identify it exactly.

Q. I will ask you whether or not you ever learned from Mrs. Phinney who it was that telephoned?

A. I think the first intimation I had of any claim from Mrs. Phinney was the coming to my office of some clerk, who told me that Mrs. Phinney had telephoned to know about her husband's insurance, and so as soon as I came in I looked up the record. That was the first knowledge I had that there was a policy, or had been a policy, at all. I found out in the old book that there was a policy for one hundred thousand dollars taken in 1890, and lapsed after the payment of the first premium.

Q. Did you go to the telephone?

A. Yes. And within a day I think I called up Mrs. Phinney myself. I am not sure it was a telephone at the residence, or how it was, but I communicated a second time; but she asked if I was the manager, and I said yes, and she inquired whether Mr. Phinney had a policy in the company, and I inferred from the conversation that she didn't know how much it was, or the number of it, or anything about it—in fact, she asked me the amount.

Q. At that time did Mrs. Phinney ask the amount of the policy?

A. Yes, sir; asked for how much he was insured. I said he had a policy for a hundred thousand dollars, but it was not in force. I think she inquired whether it was possible that it would be in force, and I said no, not unless the premiums had been paid direct to the home office which seemed highly improbable, because both he and Stinson lived in the city, and the natural course would be to pay them through him, so I then wrote to San Francisco to inquire if possibly these premiums had been paid, and found out substantially that the policy had lapsed after the payment of the first premium.

Cross-Examination.

Q. (By Mr. Burleigh.) Mr. Pond, when you had informed Mrs. Phinney that policy had lapsed, you supposed that it lapsed because you understood the premiums had not been paid, did you not? A. Yes, sir.

Q. You know nothing of that transaction whatever of your own knowledge? A. Which transaction?

Q. The Phinney insurance. A. No.

Q. You were not connected with the company, you say, until Mr. Stinson went out? Now, what time in 1893 was that? A. June, 1894.

Q. Do you know when Phinney died?

A. No. I think it was about three years and a half, taking the insurance as far as I recollect.

Q. When was it, with reference to this time, when Stinson went out and you took charge?

A. I never looked that up. He probably died before that though, but I am not quite sure.

Q. You took charge in June, 1894?

A. June, 1894.

Q. You had no personal knowledge of anything that transpired in connection with the company's business here prior to that time, or say the 12th of September, 1893?

A. No. I didn't come here until the end of November, 1893, and then as cashier.

(Testimony of witness closed.)

(At this time further proceedings were adjourned until to-morrow morning at 10 o'clock.

Seattle, July 27, 1895. Continuation of proceedings pursuant to adjournment at 10 o'clock A. M.

DR. J. B. EAGLESON, a witness called on behalf of the defendant being first duly sworn, testified as follows:

Q. (By Mr. Gilman.)—You are a physician and surgeon practicing at Seattle? A. Yes, sir.

Q. In September, October, November, and December, 1891, were you the medical examiner of the Mutual Life Insurance Company of New York?

A. I was.

Q. Were you also the medical examiner of the Equitable Life Insurance Company? A. Yes, sir.

Q. Now, do you recollect in September, 1891, examining Guy C. Phinney for insurance in the Equitable Life?

A. Yes, sir.

Q. Can you state the date of that examination?

A. I think it was September 30.

Q. Now, subsequent to that date was any application made to you—What, if any application subsequent to that time was made to you for a certificate of health on the part of Guy C. Phinney for the Mutual Life?

Objected to by plaintiff unless shown application was made by Phinney.

Counsel for defendant states he wishes to show that the result was communicated to Phinney.

Objected to by plaintiff as incompetent, irrelevant, and immaterial.

Objection sustained; exception allowed.

Q. I will ask this question, stating to the Court that Mr. Stinson testified, without objection that he went to Dr. Eagleson for a certificate of health for Mr. Phinney: How long after the 30th of September when the examination was made for the Mutual (?) Life was it that Mr. Stinson came to you asking for a certificate of health for Phinney.

Objected to as incompetent, irrelevant, and immaterial by plaintiff.

Objection sustained; exception allowed.

Q. I will ask you whether or not about the middle of November, 1891, Mr. Stinson made an application to you as medical examiner of the Mutual Life Insurance Company, the defendant in this action, for a certificate of health for Guy C. Phinney?

Objected to by plaintiff as incompetent, irrelevant, and immaterial, and as leading.

Objection sustained, on the ground that it is incompetent and irrelevant. Exception allowed.

(Testimony of witness closed.)

Mr. Gilman.—Mr. Stinson was requested on yesterday, if the Court please, to produce certain documents. I think we have them all here.

Mr. Warburton.—I desire to cross-examine him further.

MR. F. L. STINSON recalled for further cross-examination:

Q. (By Mr. Warburton.) Are you now able to tell the exact amount of cash received by you on this policy?

A. Within a few dollars, yes.

Q. How much was it, cash?

A. I do not remember of any cash except the payment of the notes.

Q. You said on yesterday you received \$200?

A. Yes, \$200.

Q. When did you receive that?

A. That was in October—I meant in addition to my testimony yesterday.

Q. You received two hundred dollars in cash in October? A. Yes, sir.

Q. September 22 G. C. Phinney made two notes to you for \$250 each, did he not?

A. Well, I think it was October 22 that he made two notes.

Q. Have you got your book here?

A. Yes, sir.

Q. Will you show it?

A. Yes, sir; September 23 it was.

Q. \$500? A. Yes, sir.

Q. Two years? A. Yes, sir.

Q. When did the notes mature?

A. The record shows that they matured February 23 and March 23, 1891.

Q. When was the other note dated?

A. October 22, 1890.

Q. They matured in February, did they not?

A. That one matured in March, 1891.

Q. That was \$308, was it not. A. Yes, sir.

Q. When were these notes paid?

A. I could not tell definitely when they were paid.

Q. Have you not any memorandum stating when they were paid? A. No.

Q. Was each note taken up wholly at the time it was paid?

A. I don't think so. It was so long ago I do not remember.

Q. Have you no record at all by which you can refresh your recollection about that?

A. No; I have n't.

Q. What is that book you hold in your hand?

A. This is bills receivable and payable book.

Q. For 1890 and 1891?

A. Yes; for 1890 and 1891.

Q. Have you got a note of G. C. Phinney payable in September or October, 1891, there in that book?

A. If I have, I have not noticed it.

Q. Just look through, and see if you have?

(Witness examines book.)

Q. You cannot find any?

A. I do not see any.

Q. Now, have you made search to find out when these notes were paid?

A. Yes, sir; I have looked.

Q. You cannot find it?

A. No, sir; I cannot find any record.

Q. Would the Boston National Bank know? I see that you marked on there, deposited with Boston National Bank?

A. They might; I don't know.

Q. I will ask you, Mr. Stinson, if Mr. Phinney, in the month of July or August, 1893, had any conversation with you with reference to whether he had better surrender or reduce the amount of this policy in the Mutual Life Insurance Company of New York, or whether he had better reduce the amount he held in the New York Life.

A. What year was that?

Q. July or August, 1893?

A. I do not remember any such conversation.

Q. Did you have a conversation with Mr. Phinney at the foot of the stairs of your office, either in the month of July or August, in the presence or close to Mr. Barber and C. A. Mitchell—you know the New York Life Insurance agents—in which the conversation was concerning whether it was most advisable to reduce your policy, the amount of the policy held in your company, or the amount held in the New York Life?

A. I do not remember any such conversation.

Q. If you had had such a conversation you would remember it? A. I think I would; yes, sir.

Q. I hand you a letter and ask you to identify it, Mr. Stinson.

Mr. Gilman.—We will admit these that have been identified as his signature by other parties. We admit these are his signatures.

Q. Is there any relation existing between you and counsel for defendant, Mr. Gilman—are you a brother-in-law of Mr. Gilman's? A. Yes, sir.

Q. Was it not your custom, and did you not in several instances, namely: at least Van Haseltine and Mr. Heilbron, deliver a policy in the Mutual Life Insurance Company to them, and receive in payment therefor three years' advance in property?

Objected to by defendant as incompetent, irrelevant and immaterial.

Objection sustained; exception allowed.

Q. You were the agent of the Mutual Life Insurance Company? A. Yes, sir.

Q. Did Mr. McCurdy know that you were agent of the Mutual Life Insurance Company of New York?

Objected to by defendant as incompetent, irrelevant, and immaterial.

Objection sustained; exception allowed.

Q. You had a conversation, or one or two conversations with Mr. Daniel Jones—you know Mr. Jones—with reference to how Mr. Phinney paid the first premiums on this policy, did you not?

A. The first premium; I think so.

Q. In your office?

A. I do not remember whether in my office or not.

Q. You remember, do you not, of showing him some papers in your office, a mortgage—and gave him the number of the mortgage and volume, and place where it is to be found of record?

A. I do not remember showing him any mortgages. I showed him some deeds.

Q. You remember that circumstance; you remember one time when he was in there?

A. I remember showing Jones some deeds.

Q. That is the time I refer to—about six weeks ago.

A. It was a short time ago.

Q. Did you not then state to Mr. Daniel Jones that this larger mortgage which I showed you yesterday, or the smaller one—one or both—was paid in that way?

A. In what way?

Q. Those mortgages were paid by crediting Phinney with so much insurance on his first premium?

A. I did not; no, sir.

Q. Or words to that effect?

A. I did not tell him how anything but the first premium was paid in any way.

Q. How the second premium was paid?

A. I said anything but the first premium.

Redirect Examination.

Q. (By Mr. Gilman.) Mr. Stinson, in 1889 did you buy some property from Guy C. Phinney.

A. I did.

Q. Through whom did the title come?

A. I think it was through E. P. Ferry.

Q. I will ask you to look at that paper and see if that is the deed you received? A. Yes, sir.

Paper identified by witness offered in evidence by defendant.

The Court.—I do not think it necessary to introduce that much matter in the record. The mortgages have been introduced, and you can show how and when they were paid.

Q. Now, look at these certified copies—that is the mortgage, is it not given to Guy C. Phinney to secure the payment of the sum of \$2500, dated the 28th day of October, 1889? A. Yes, sir.

Q. You gave that mortgage, did you not?

A. I did.

Q. I will ask you if that did not evidence the payment—was not that security for the payment of two notes, one for \$2,000 and one for \$500?

A. Yes, sir.

Q. Look at this and see if they are the notes?

A. Yes, sir.

Defendant offers in evidence notes identified by the witness.

Papers received without objection, and marked defendant's Exhibits 2 and 3 respectively.

EXHIBIT 2.

\$2000.00.

Seattle, Wash., Oct. 28th, 1889.

On or before one year after date, for value received, I promise to pay to the order of Guy C. Phinney, at the

Puget Sound National Bank, in the city of Seattle, the sum of two thousand dollars, with interest at the rate of ten per cent per annum from date until paid. The interest shall be paid at the expiration of every twelve months, and if not so paid to be compounded with the principal and draw interest at the same rate. And if suit shall be commenced for the recovery of any amount due upon this note, I agree to pay a counsel fee of five per cent upon the amount which may be found to be due.

FRED L. STINSON."

[Endorsed on face]: "The Boston National Bank of Seattle. Paid Nov. 1, 1890. Note Teller."

EXHIBIT 3.

\$500.00.

"Seattle, Wash., Oct. 28, 1889.

On or before six months after date, for value received, I promise to pay to the order of Guy C. Phinney, at the Puget Sound National Bank, in city of Seattle, the sum of five hundred dollars, with interest at the rate of ten per cent per annum from date until paid. The interest shall be paid at the expiration of every six months, and if not so paid to be compounded with the principal and draw interest at the same rate. And if suit shall be commenced for the recovery of any amount due upon this note, I agree to pay a counsel fee of five per cent upon the amount which may be found to be due.

FRED L. STINSON."

(Endorsed across the face.)

"Paid January 21, '91."

(Endorsed on back.)

"Without recourse on me, Guy C. Phinney, Daniel

Jones. Sept. 12th, 1890. Received on the within three hundred and fifty dollars, Daniel Jones."

"Defendant's Exhibit 3. Filed July 26, 1885, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Then on the 23rd day of October, 1889, you made a mortgage to Gov. Ferry for sixteen hundred and fifty dollars, did you not? A. Yes; about that time.

Q. Was that mortgage afterwards assigned to Guy C. Phinney? A. It was.

Q. This is the mortgage, is it not?

A. Yes, sir.

Q. Now, referring to the sixteen hundred and fifty dollar mortgage, did you make any payments thereon prior to the first day of November, 1890.

A. Yes, sir.

Q. Did you make a payment to Gov. Ferry or to Mr. Phinney for him?

A. Well, I made the payment, I think it was to—

Q. Did you receive a satisfaction at that time?

A. I did.

Q. I will ask you to look at that satisfaction and see if it is the satisfaction referred to. A. Yes, sir.

Defendant's counsel offers paper identified by witness in evidence. Paper received without objection, and marked Defendant's Exhibit 4.

EXHIBIT 4.

"Be it known, that I, Elisha P. Ferry, for and in consideration of three hundred and sixty-one dollars and fifty cents (\$361.50) lawful money of the U. S., to me in

hand paid, receipt whereof is hereby acknowledged, said amount being the balance of the purchase money for the hereinafter described property, do hereby certify and declare that a certain mortgage bearing date the twenty-third day of October, 1889, made and executed by Fred L. Stinson, the party of the first part therein, to Elisha P. Ferry, the party of the second part therein, which said mortgage was recorded in the office of the county auditor of the county of King, and State of Washington, in volume — of Mortgages, on page —, on the — day of October, 1889, is hereby fully paid, satisfied, and discharged as to the following lots, to wit: lots one (1), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), eighteen (18), nineteen (19), and twenty (20), all of said lots being in block two (2) of the Lake Union Second Addition to the city of Seattle, State of Washington, and the said lots are hereby forever released from the operation and effect of said mortgage.

In witness whereof, I have hereunto set my hand and seal this 24th day of December, A. D. 1889.

[Seal]

ELISHA P. FERRY.

Signed, sealed, and delivered in the presence of A. Martin."

"State of Washington,)
County of King.) ss.

This is to certify that, on the 24th day of December, 1889, before me, a notary public, in and for the State of Washington, duly commissioned and sworn, personally came Elisha P. Ferry, to me known to be the individual

described in, and who executed, the within instrument, and acknowledged to me that he signed and sealed the same, as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, this day of
 , 1889.

W. T. CAVANAUGH,
Notary Public."

(Endorsed): "No. 44605. Elisha P. Ferry to Fred L. Stinson. Satisfaction of Mortgage. Filed for record at the request of F. L. Stinson, Dec. 27, A. D. 1889, at 6 min. past 3 P. M., and recorded in Vol. 43, of Mtgs., page 427, records of King County, Wash. W. R. Forest, Co. Auditor."

"Defendant's Exhibit 4. Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. I will ask you, if afterwards, you made a payment to Phinney, and received a satisfaction of mortgage?

A. Yes, sir.

Q. Is this the satisfaction you received from Mr. Phinney? A. Yes, sir.

Q. Do you know the amount of payment received on this satisfaction, or can you ascertain it?

A. I think I can tell the amount. There is a check for that.

Q. Look at your stub book, and see if you can tell the amount. A. Yes, sir; \$210.30.

Q. What is the date? A. September 3, 1890.

Q. The satisfaction bears date the 28th of August,

1890. Do you know whether or not it is the same transaction? A. It was.

Q. Then you made two payments, one of \$361.50 and the other \$210—that left about how much due on the mortgage?

A. A little over ten hundred dollars.

Defendant offers in evidence satisfaction of mortgage identified by the witness.

Paper received without objection and marked defendant's Exhibit 5.

EXHIBIT 5.

Know all men by these presents, that I, Guy C. Phinney, do hereby certify and declare that a certain mortgage, bearing date the 23rd day of October, 1889, made and executed by Fred L. Stinson, party of the first part therein, to E. P. Ferry, the party of the second part therein, and duly recorded on the 28th day of October, 1889, in the office of the auditor of King County, in Volume 41 of Mortgages, at page 381, which said mortgage was by said E. P. Ferry duly assigned to me by assignment of mortgage, dated April 24, 1890, and recorded in the office of the county auditor of the county of King and State of Washington, in Volume 48 of Mortgages, on page , on the 24th of April, 1890, together with the debt thereby secured, is fully paid, satisfied, and discharged as to lots 2, 3, 4, 14, 15, 16 and 17, in Block 2 of Lake Union 2d Addition to the city of Seattle, and said lots are hereby fully released and discharged from the lien of said mortgage.

In witness whereof, said party of the first part has

hereunto set his hand and seal, the 28th day of August, 1890.

[Seal]

GUY C. PHINNEY.

Signed, sealed, and delivered in presence H. S. Turner,
D. H. Blackmar.

State of Washington,)
County of King,) ss.

This is to certify, that on this 3rd day of September, A. D. 1890, before me, D. H. Blackmar, a notary public, in and for the State of Washington, duly commissioned and sworn, personally came Guy C. Phinney, to me known to be the individual described in, and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal]

D. H. BLACKMAR,

Notary Public in and for Washington, residing at Seattle."

"61815. Satisfaction of mortgage. From Guy C. Phinney to Fred L. Stinson. Dated Sept. 3d, 1890."

"State of Washington,)
King County.) ss.

I hereby certify that the within instrument was filed for record in the office of the auditor of King County Wash., at the request of Fred L. Stinson, on Sep. 3, 1890 at 40 min. past 12 o'clock M., and that it has been recorded and is now of record in Volume 58 of Mtgs., on page

247 of the records of said county. W. R. Forest, Auditor King Co., Wash."

"Defendant's Exhibit 5. Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Now then, returning to the twenty-five hundred dollars mortgage which secured two notes, one for two thousand and one for five hundred dollars, what became of those notes?

A. One of those notes was hypothecated with Daniel Jones—the five hundred dollar note.

Q. This same Daniel Jones they have been talking about?

A. Yes, sir. And the other one was hypothecated at the Boston National Bank.

Q. Take the first five hundred dollar note which was hypothecated with Daniel Jones. Do you know Daniel Jones' signature? A. Yes, sir.

Q. Is that his signature on the back there?

A. It is.

Q. Receipting the acknowledgment of how much money? A. Three hundred and fifty dollars.

Q. I will ask you to look at that check; is that the check given to Jones for the three hundred and fifty dollars. A. Yes, sir.

Defendant offers in evidence check identified by witness. Paper received without objection, and marked defendant's Exhibit 6.

EXHIBIT "6."

Seattle, Washington, Sept. 12th, 1890.

The Boston National Bank of Seattle pay to the order of Daniel Jones \$350 three hundred and fifty dollars.

No. 369.

F. L. STINSON."

[Endorsed]:

"Daniel Jones."

Defendant's Exhibit 6. Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Do you recollect when you finally paid that note?

A. I think January 31, 1891. It is marked on the note.

Q. You stated that two thousand dollar note had been hypothecated with the Boston National Bank.

A. Yes, sir.

Q. Was the sixteen hundred and fifty dollar note, less the payments that had been made, also hypothecated with the Boston National Bank?

A. That is where it was paid—I presume it was.

Q. Now, on what day did he pay it? You can refresh your memory from the check.

A. November 1, 1890.

Q. Is that the check with which you paid it?

A. Yes, sir.

Q. This two thousand dollar note bears the stamp of the Boston National Bank as paid on that date?

A. Yes, sir.

Q. Were the mortgages that the check was given to pay satisfied on the same date?

A. Yes, sir.

Q. What, if any, notes other than this sixteen hundred and fifty dollar note and the twenty-five hundred dollars did you give to Guy C. Phinney?

A. I do not remember of any notes except these.

Q. I will ask you whether or not you communicated to Mr. Phinney the result of your visit to Dr. Eagleson for a certificate of health? A. I did.

Recross-Examination.

Q. (By Mr. Warburton.) Have you the \$210 check?

A. I have the stub-book.

Q. What is the date of that?

A. September 3, 1890.

Q. Did you owe the Boston National Bank any money yourself outside of these notes in November, 1890? Outside of these notes that were hypothecated there?

Objected to as immaterial by defendant.

Objection overruled. Exception allowed.

Q. You say you did owe the bank?

A. Yes, sir.

Q. How much? A. I don't know.

Q. How are you positive about the fact that this check was payable to the Phinney note?

A. Because the bank-book shows it.

Q. Have you any record or anything else so that you can in any manner tell how much you owed the bank at that time? A. Personally?

Q. Well, in any way outside of these Phinney notes?

A. No; but the bank book will show it. I don't know myself, for I haven't looked it up.

Q. Do you think you owed as much or more than this payment? A. I think perhaps so.

Q. Did you take up any other papers on that date in the bank? A. I do not think so.

Q. (By Mr. Gilman.) Your bills receivable book shows that two of the notes bear date September 22. Is there any memorandum or anything that will show when they were delivered to you?

A. The notes were delivered to me?

Q. Yes, sir.

A. Except that it is marked here that they were deposited at the Boston National Bank.

Q. At what date. A. November 10, 1890.

Q. Have you any recollection when the deposit was made with reference to delivery?

A. I do not exactly understand your position.

Q. Have you any recollection how long you kept the notes after they were delivered to you before they were deposited?

A. Well, no; I presume only a short time.

Q. Have you no recollection of the particular circumstances? A. No, sir.

Q. What was your custom with reference to depositing notes?

Objected to by plaintiff as immaterial.

The Court. I understand these notes were deposited as collateral security?

Q. For what purpose were these notes deposited with the Boston National Bank?

A. To receive cash.

Q. Did you discount them? A. Yes, sir.

Q. What was your custom, say, with reference to discounting notes received in your business, if you had a custom?

Objected to by plaintiff as incompetent, immaterial.

Objection sustained. Exception allowed.

Q. (Mr. Warburton.) Do you know the date of this policy? A. September 24, 1890, I think.

Q. Do you know when the policy was issued by the company? A. Only by the date; that is all.

Q. Don't you know that you received a telegram stating it would be issued on or about the 22nd of October?

A. I do not remember; the telegram will show. I don't remember.

Q. Now, Mr. Stinson, if the first premium was not paid or provided for, is it not a fact that what you call a C. O. D. policy, the policy would be dated on the date of the issuance of the policy?

A. The policy naturally would be dated the date of the issuance of the policy.

Q. When the premium is paid in advance, and a binding receipt is given so as to insure the risk, providing the insurance is accepted and the money is paid in advance, then the policy bears date of the application?

Objected to by defendant as immaterial.

Objection sustained. Exception allowed.

(Testimony of witness closed.)

HERMAN CHAPIN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By Mr. Gilman.) You reside in Seattle?

A. Yes, sir.

Q. In what business are you engaged?

A. Banking business.

Q. With what bank are you connected?

A. Boston National Bank.

Q. In what capacity? A. President.

Q. Were you connected with that bank in the year 1890? A. Yes, sir.

Q. Do you know Mr. Fred L. Stinson?

A. Yes, sir.

Q. Did you know Mr. Guy C. Phinney?

A. Yes, sir.

Q. I will ask you whether or not Mr. Stinson and Mr. Phinney were doing business with your bank in September, 1890? A. Yes, sir.

Q. I will ask you to look at this check marked defendant's Exhibit "7," and state whether that check was paid by your bank on the first day of November, 1890?

Objected to by plaintiff as incompetent, irrelevant, and immaterial, and as relating to a collateral matter.

Objection overruled. Exception allowed.

A. Yes, sir.

Q. Is there any record in your bank book, or papers in your bank, that shows to whose account it was paid, and for what it was paid?

Mr. Burleigh. I suppose it is understood that all this

evidence goes in subject to our objection, so that there is no necessity of repeating it?

The Court. Yes, sir; your objection is overruled, and exception allowed.

A. Well, the check was paid at the bank and from this deposit ticket, the same amount. I should say it was paid and placed to the account of G. C. Phinney, special, which was an account, to the best of my recollection, made in order to—

Q. (By Mr. Burleigh.) Who made that deposit slip?

A. I did myself. That is in my handwriting. To the best of my recollection, it was a part payment on an obligation of Mr. Phinney's.

Q. (By Mr. Gilman.) Does that memorandum that you made yourself at the time show on what it was paid, that is, by Mr. Stinson?

A. It is here, Stinsons notes, \$2000; interest, \$202.20; note, \$1076.90; and interest, \$134.90. Beyond that I have no recollection.

Q. Have you any recollection as to whether or not the Stinson notes were deposited there as collateral security for Phinney's obligation?

A. I have no record of that.

Q. You do not keep a record of collateral notes?

A. No, sir; except on the original note. It is marked on the note for which it is collateral.

Q. You have not that original note of Phinney now?

A. No, sir.

Q. (By The Court.) Do you keep a record of discounts when you take securities and discounts?

A. Yes, sir.

Q. Did you look to see whether this was discounted at the bank? A. This is a collateral note.

Q. The Stinson note?

A. No; I did not look; no, sir.

Q. (By Mr. Gilman.) If a note was put in by Mr. Phinney as collateral for his own obligation, it would not go as discounted paper, would it—there would be no record of his discounted paper?

A. If the note—

Q. No. To make it clear to you, if Mr. Phinney gave his obligation to the bank, and gave collateral to secure it, this collateral that he gave to secure it would not pass through the bank as discounted paper?

A. No.

Q. And the record of that paper would only appear on the original note.

A. Yes; on the original note.

Q. On Phinney's principal note, and there would be no other record of it in the bank? A. No.

Q. And this original note has been surrendered?

A. I suppose so.

Cross-Examination.

Q. (By Mr. Burleigh. What is the amount of this ticket? A. \$3414.

Q. How much of the proceeds of that \$3414 actually went to Phinney's credit in your bank?

A. Well, the whole of it, I imagine from this ticket.

Q. Can you tell from the ticket whether it did or not?

A. I cannot tell whether this check paid that ticket; no, sir.

Q. (By Mr. Gilman.) It corresponds in amount?

A. Yes, sir; each are \$3414.

Q. That ticket shows it was paid on Stinson's notes?

A. Yes, sir.

Q. (By Mr. Burleigh.) Stinson owed you other money at that time, did n't he?

Objected to by defendant as immaterial.

Objection overruled. Exception allowed.

A. I cannot tell here.

Q. What is your best recollection about it?

A. Stinson owed us money at times about that time.

If I should give a guess I should say yes.

(Testimony of witness closed.)

Defendant offers in evidence the ticket and check referred to by witness.

Objected to by plaintiff for the same reasons urged to the testimony of the witness Chapin.

Objection overruled. Exception allowed.

Papers received and marked Defendant's Exhibits 7 and 8, respectively.

EXHIBIT "7".

"Seattle, Wash., Nov. 1st, 1890.

The Boston National Bank of Seattle pay to the order of Boston Nat. Bank \$3414 (Thirty-four hundred & fourteen dollars).

F. L. STINSON."

[Endorsed]: "Defendant's Exhibit '7.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

EXHIBIT 8.

"Deposited in Boston National Bank of Seattle by G. C. Phinney Special, Seattle, Nov. 1, 1890.

Stinsons

Notes	2000.
Int.	202.20
Note	1076.90
Int.	134.90
	<hr/>
	3414.00"

[Endorsed]: "Defendant's Exhibit 8. Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Defendant rests.

Plaintiff's Rebuttal.

DANIEL JONES, witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Q. (By Mr. Burleigh.) Where do you reside?

A. Seattle.

Q. How long have you lived here?

A. Seven years.

Q. What is your business?

A. Real estate broker.

Q. Were you acquainted with Mr. Phinney?

A. Yes, sir.

Q. Do you know Mr. Stinson? A. I do.

Q. Did you have a conversation with Mr. Stinson about six weeks ago at his office concerning the subject of the payment of premiums on this insurance policy, in controversy in this case, by Mr. Phinney?

A. I did.

Q. State whether or not, in that conversation, Mr. Stinson stated to you that Mr. Phinney had partially paid the premiums on that insurance by cancellation of the mortgage or mortgages on the Lake Union Second Addition, or words to that effect.

A. He did not say it exactly that way. I asked him the question——

Objected to by defendant.

Q. I say, or words to that effect.

Objected to by defendant.

Objection overruled. Exception allowed.

Q. Did he say in effect, Mr. Jones, that Mr. Phinney had paid part of these premiums by the cancellation of mortgages or a mortgage on that Lake Union Second Addition?

A. A mortgage on Lake Union Second Addition, he did.

Q. What did he say?

Objected to by defendant.

Objection overruled. Exception allowed.

A. Having been the agent of the addition, I asked him the question, if any property or mortgages that affected that Lake Union Second Addition had been paid in these settlements with G. C. Phinney on this insur-

ance, and he gave me—he says yes, and he gave me the date or a memorandum showing the page of the book of a mortgage.

Q. Do you recollect what that date or page was?

A. I recollect that the date of the mortgage was in 1889 and was made for one year's time. I do not recollect the page and book—the mortgage book that it was recorded in, although I marked it down at the time.

Q. Have you the memorandum that you made at the time?

A. I have not. In conversation with Warburton afterwards, I gave it to him.

Q. You did give it to him? A. Yes, sir.

Q. Do you remember the amount of the mortgage that was cancelled? A. No, sir; I do not.

Cross-Examination.

Q. (By Mr. Gilman.) Now, is not this what Mr. Stinson told you—did not you ask him if any of these property deals entered into the premium for that insurance?

A. The question had been asked by the plaintiff's agent in reference to this particular transaction of Lake Union Second, and I went to Stinson purposely—I had forgotten, although I had been the agent, and I went to Stinson purposely to find out about Lake Union Second Addition. That is the question I asked him.

Q. Stinson did not tell you, as I understand it, that he cancelled these mortgages on Lake Union Second in part payment of premium?

A. He said one of them had been applied in that way.

Q. Did he say which one?

A. Yes, sir; he gave it only by book and page.

Q. You know that the twenty-five hundred dollar mortgage was not applied in that way?

A. I don't know anything about it, only from what I heard in the courtroom today, which recalls to my mind that five hundred dollars was paid to me.

Q. Stinson paid five hundred dollars of the twenty-five hundred dollar mortgage? A. Yes, sir.

Q. Now, Mr. Stinson, did he tell you that he took property for a portion of that premium?

A. He told me he also took lots in Woodland Park, and he corrected it as Woodland Park Supplemental, and he gave me the book and page of that also.

(Testimony of witness closed.)

Under a commission duly issued out of said Circuit Court, the plaintiff caused to be taken the deposition of H. E. Duncan, corresponding secretary of said company, a resident of the State of New York, by a commissioner duly appointed for that purpose, a resident in the State of New York, and plaintiff now read in evidence the said deposition, which was as follows:

Mr. Duncan's Deposition.

Q. State your name, residence, and occupation since January 1st, 1890.

A. Henry E. Duncan, corresponding secretary of the Mutual Life Insurance Company of New York.

Q. Did the company receive any other report or information of any kind from any source as to the character and habits of said Guy C. Phinney other than that contained in his application? If so, what?

A. Not that I remember. There are no papers on file with us showing it.

Q. Did the Mutual Life Insurance Company of New York instruct any of its agents, especially A. B. Forbes, or A. B. Forbes & Son of San Francisco, or F. L. Stinson of Seattle, not to accept the second premium on said Guy C. Phinney's policy after September 24th, 1891?

A. Not that I am aware of.

Q. Was there any entry or record made in the books of the company prior to September 1st, 1891, which showed, or was intended to show or indicate to the officers or agents of the said company that said Guy C. Phinney was not a desirable risk for the company to carry?

A. None whatever, either prior to Sept. 1st, 1891, or prior to the time the premium became due.

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by or on behalf of the company looking toward that end?

A. Mr. Forbes had charge of that matter, and it was attended to in the West. After the premium was due and unpaid, Mr. Stark made reports, of which the following are true copies:

(Sheet 1.)

No. 422198. Amount \$100,000.

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, Pres. City National Bank.

Date of investigation, Jan. 22, 1892.

Remarks.

Financially all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

[Signed]

STARK.

(Sheet 2.)

No. 422198. Amount \$100,000.

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, Pres. City Natl. Bank.

Date of investigation. Forfeited.

Remarks.

All right fin. but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

[Signed]

STARK.

Awaiting particulars.

- Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties:

if in writing, attach a copy of the same to this deposition and properly identify it.

A. Mr. Forbes has charge of this matter, and it was attended to in the West.

Q. Attach to your deposition every writing of every kind or description, between the Mutual Life Insurance Company of New York, and its agents, or between it and Guy C. Phinney, that in any manner related to or is connected with a waiver and abandonment or rescission of the contract.

A. No such writings on file in this office. It was attended to in the West. When—

Q. When was the Mutual Life Insurance Company of New York first informed that a mutual agreement had been consummated between it and Guy C. Phinney, wherein it was mutually agreed that the said policy of insurance on Phinney's life should be waived, abandoned, or rescinded? A. In the fall of 1891.

Q. Give the name of the party or agent who gave the company such information, and attach the original, or a copy of the letter, to this deposition, and properly identify it, or, if you have not the original, then attach a copy of it.

A. The matter was attended to by Mr. Forbes and his representatives in the West, and our information came from that source. I can find no letters on our files regarding this matter.

Q. When was the Mutual Life Insurance Company of New York first informed that said Phinney had surrendered his policy to it? Give the name of the party or agent who so informed the company, and attach the or-

iginal letter, or a copy, to this deposition, and properly identify it?

A. My answers to Nos. 9 and 10 cover this question.

Q. What report was made to the company of New York by either F. L. Stinson, of Seattle, or A. B. Forbes, or A. B. Forbes & Son, of San Francisco, as to the collection or non-collection of the second premium on the Phinney policy, number 422198?

A. The attached and marked Exhibit "A" is a true and exact copy of that portion of the monthly account of A. B. Forbes, general agent, which refers to the non-payment of the premium by Phinney.

In order to understand those papers, it is necessary for me to state the method of collecting premiums which is pursued by the company. Each month a statement is sent to Mr. Forbes of premiums which will become due in the following month, together with renewal receipts for each premium. Such an account was sent to Mr. Forbes in the month of August, 1891, which contained a receipt for the premium due on the Phinney policy in 1891. Mr. Forbes had no power to deliver this receipt to the insured except upon receipt of the premium. In the month of October, 1891, it was the duty of Mr. Forbes to send to the company a statement in the form which I produced (Exhibit "A") showing the premiums paid and unpaid during that month. Mr. Forbes did send, October, 1891, a statement in the form above referred to, which was the statement made out by the company and sent to him; it is the custom to draw a red line through any premium which is not paid, and return the renewal

receipt. I produce here the original report sent by Mr. Forbes, and also a copy of so much of the report as relates to the Phinney policy. The red lines indicate that the Phinney premium was not paid. The renewal receipt came back at the same time. These renewal receipts for unpaid premiums are always, within a short time of their receipt, destroyed by the company, and the Phinney receipt was so destroyed. An entry is then made on the books of the company that the premium is unpaid, and the policy is forfeited. The word "forfeited" is used to cover all cases, including those where there is an acquiescence in a forfeiture, and a mutual agreement of forfeiture. This was done in the Phinney case. I produce the original register containing the register of this policy and other policies of the company. This register contains the following entry: "Forfeited Sep. 25th, 1891. Do not restore, 2nd vice-president, 28th March, 1892."

Q. Please attach to this deposition the original or copy of such report, and properly identify it.

A. I produce the original of such report. Exhibit "A" is a copy of said original.

Q. In what manner did the policy of Guy C. Phinney, number 422198, appear on the books of the company on the 12th day of September, 1893, as to whether it was a live, dead, or terminated policy?

A. I produce here a book of the company, and the entries therein are as follows: "Forfeited Sep. 25th, 1891. Do not restore, 2nd vice-president, 28th March, 1892."

Q. Make a true copy or copies of the entry or entries

on such book or books, stating where found, and attach them to this deposition, and properly identify them.

A. I have answered this.

Q. If your answer to preceding interrogatories disclose that the policy appeared on the books of the insurance company as a dead or terminated policy, state whether it was designated as a "lapsed" or "forfeited" policy.

A. I have answered this.

Q. Was the Mutual Life Insurance Company of New York ever informed by one Nellie Phinney, executrix, that said Guy C. Phinney had died in September, 1893?

A. The company's records do not show this, and I have no recollection of it.

Q. If you answer the preceding interrogatory in the affirmative attach said letter to this deposition, if you can, and properly identify it.

Q. Did the Mutual Life Insurance Company of New York ever answer the letter above described? If so, when and by whom was such letter signed?

A. Have no letter; nor is there any record in the office of such letter having been written to the plaintiff.

Q. Did the Mutual Life Insurance Company, in 1894, receive two affidavits, one signed by Nellie Phinney, stating that Guy C. Phinney had died on or about the 12th day of September, 1893? If so, attach to this deposition said affidavits, and properly identify them.

A. Not that I remember; I find, however, that on a printed form we acknowledged receipt to Mrs. Phinney of an affidavit, but this paper cannot be found, and I have no knowledge of its nature or contents.

Q. Do you know, or can you set forth any other mat-

ter, or anything which may be of benefit or advantage to the parties at issue in this cause, or to either of them, or that may be material to the subject of this your examination, or matters in question in this cause? If yes, set forth the same fully and at large in your answer.

A. No.

Under a commission duly issued out of said Circuit Court the plaintiff caused to be taken the deposition of Richard A. McCurdy, the president of said company, a resident of the State of New York, by a commissioner duly appointed for that purpose, a resident of the State of New York, and plaintiff now read in evidence the said deposition, which was as follows:

Richard A. McCurdy's Deposition.

Q. State your name, residence, and occupation since January 1st, 1890.

A. Richard A. McCurdy, president of the Mutual Life Insurance Company of New York.

Q. What relation, if any, existed between the Mutual Life Insurance Company, of New York, A. B. Forbes, and A. B. Forbes & Son, of San Francisco, California, and F. L. Stinson, of Seattle, at all times between January 1st, 1890, and October 1st, 1893 State fully.

A. A. B. Forbes was the general agent for the Pacific Coast, including the State of Washington. No relation existed between this company and Mr. Forbes' son or A. B. Forbes & Son. No relation existed between this company and F. L. Stinson.

Q. If, in answer to interrogatory four, you say that

F. L. Stinson, of Seattle, Washington, represented the said Mutual Life Insurance Company of New York, as agent, state fully his powers and duties in every particular; if his agency was created by writing, attach the original, otherwise a copy, and properly identify it.

A. Mr. Stinson did not represent the company as its agent.

Q. Did the Mutual Life Insurance Company of New York, in the year 1890 and 1891, have employed an "Inspector of Risks," or person whose duty it was to report upon the risks being carried in the State of Washington, by the Mutual Life Insurance Company of New York? If so, state his name; if more than one, state the names of each.

A. From about December, 1891, and through 1892, Ernest Stark was employed by the company to make investigations into risks carried in the State of Washington, and also into risks recently abandoned after forfeiture or otherwise, as insured were liable to make application for restoration, and it was more economical to examine all risks, whether in force or not, at one time.

Q. Did not Guy C. Phinney apply for a policy of insurance on the ordinary life plan? Objection sustained.

A. Yes.

Q. How did it come that the policy issued was a twenty pay life policy? What motive did the company have in requiring or asking the change? Objection sustained.

A. The company did not require or ask the change. The records show that Mr. Phinney asked for it.

Q. Please attach originals or copies of all correspond-

ence that passed between the company and its agents, respecting the change from ordinary life to twenty pay life, and properly identify them.

A. The records in New York have been examined and there is none, except the request in the usual form, of which the following is a copy. (Exhibit "A." R. A. McC.)

Q. Did the company receive any other report or information of any kind from any source as to the character and habits of said Guy C. Phinney other than that contained in his application? If so, what?

A. Not that I know of.

Q. Did the Mutual Life Insurance Company of New York instruct any of its agents, especially A. B. Forbes, or A. B. Forbes & Co., of San Francisco, or F. L. Stinson, of Seattle, not to accept the second premium on said Guy C. Phinney's policy after September 24th, 1891?

A. Not to my knowledge or belief.

Q. Was there any entry or record made in the books of the company prior to September 1st, 1891, which showed, or intended to show, or indicated to the officers or agents of the said company that said Guy C. Phinney was not a desirable risk for the company to carry.

A. There was none.

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance? State very fully everything said or done by or on behalf of the company looking toward that end.

A. I do not know of any.

Q. What party or parties were employed or re-

quested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties. If in writing, attach a copy of the same to this deposition, and properly identify it.

A. I know of none.

Q. Attach to your deposition every writing of every kind or description between the Mutual Life Insurance Company of New York and its agents, or between it and Guy C. Phinney, that in any manner related to or is connected with a waiver, an abandonment, or rescission of the contract.

A. There are no writings in this office except Mr. Forbes' report of the premium unpaid, and the executive direction not to restore, which latter is as follows: "Forfeited Sept. 25, 1891. Do not restore. 2nd Vice-President. 28th March, 1892."

Q. When was the Mutual Life Insurance Company of New York first informed that a mutual agreement had been consummated between it and Guy C. Phinney, wherein it was mutually agreed that the said policy of insurance on Phinney's life should be waived, abandoned, or rescinded.

A. In 1891, or early in 1892.

Q. Give the name of the party or agent that gave the company such information, and attach the original or a copy of the letter to this deposition, and properly identify it; or if you have not the original, then attach a copy of it.

A. There are no letters here.

Q. When was the Mutual Life Insurance Company of New York first informed that said Phinney had surrendered its policy to it? Give the name of the party or

agent who so informed the company, and attach the original letter or a copy to this deposition, and properly identify it.

A. I have just answered this question in the last questions you have asked me.

Q. Do you know or can you set forth any other matter, or anything which may be of benefit or advantage to the parties at issue in this cause, or to either of them, or that may be material to the subject of this your examination, or matters in question in this cause? If yes, set forth the same fully and at large in your answer.

A. No.

(At 12 o'clock further proceedings adjourned until 1:30 P. M.)

EXHIBIT "A." (R. A. McC.)

The Mutual Life Insurance Company of New York,
Office, Nassau, Cedar and Liberty streets.

The undersigned, Guy Carleton Phinney, hereby requests the Mutual Life Insurance Company of New York to change application made under date of Sept. 22nd, as follows: To 20 payment life 20 years distribution, and to issue a policy in accordance with said change.

And in consideration thereof, I hereby covenant and agree that all the statements made by me or in my behalf, contained in the original application and declaration for a policy of insurance in the Mutual Life Insurance Company of New York, and dated Sept. 22nd, 1890, are full, complete, and true, and are hereby made the basis of the contract between me and the said company

for the new policy hereby solicited, which is accepted, subject to all the conditions and stipulations contained therein.

Dated at Seattle, State of Wash., this 22nd day of October, 1890.

In the presence of F. L. Stinson.

(Signature of applicant).

GUY CARLETON PHINNEY.

(Signature of person proposed for insurance.)

GUY CARLETON PHINNEY.

Afternoon session. Continuation of proceedings pursuant to adjournment at 1:30 o'clock.

MR. A. B. FORBES, recalled by plaintiff.

Q. (By Mr. Burleigh.) I want to ask you two or three questions in reference to this case. First, I want to inquire if you were instructed or notified by the Mutual Life Insurance Company of New York not to accept the second premium on the Phinney policy, No. 422198, after September 24, 1891?

Objected to by defendant as incompetent, irrelevant, and immaterial, and not proper rebuttal.

Objection overruled. Exception allowed.

A. I was.

Q. Did you give like notice and instructions to F. L. Stinson, or forward to him any such instructions and notice given by the company with reference to the Guy C. Phinney policy?

Objected to by defendant for the reasons stated in the last objection.

Objection overruled. Exception allowed.

A. I did.

Q. What negotiations were had, if any, with Guy C. Phinney looking toward a resolution, waiver, or abandonment of his contract of insurance? State very fully everything said and done by or on behalf of the company looking toward that end.

A. That was a matter that I left the detail of to my agent here. I gave him the principal instructions, and the rest he had to perform.

Q. What instructions did you give him?

A. By telegram.

Q. Any other?

A. Perhaps a letter confirming the telegram.

Q. These documents have been put in evidence in this case?

A. I think so—I don't know whether they have or not.

Q. I will ask you to look at that copy attached to your deposition, Mr. Forbes, and state if that is your signature?

A. That is my signature there; this letter is a copy of the one received from Mr. Stinson.

Q. Please look at the document which I hand you, and state what that is. (Showing witness plaintiff's identification "K.")

A. That is a letter from Mr. Stinson returning the premiums unpaid.

Plaintiff offers in evidence plaintiff's Exhibit "K" for identification.

Objected to by defendant as incompetent and not proper rebuttal.

Objection overruled. Exception allowed.

EXHIBIT "K."

Seattle, Washington, Nov. 26th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

No. 114293 Curtis	No. 393675 Rogers
415957 Cushing	416309 Rice
418420 Calhoun	420062 Benson
441063 Raymore	441073 Patterson

September.

No. 51342 Janney	No. 270465 McKay
287091 O'Connor	307195 Mohr
373328 Finch	373530 Heaton
375371 Buttner	412636 Anderson
418608 Monroe	422198 Phinney
434207 Behrman	(Offered to pay but in ill health.)

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipts asked for) will be reported in next acct.

Yours very truly,

F. L. STINSON."

[Endorsed]: "Plaintiff's Exhibit 'K.' Filed July 25, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk.
By R. M. Hopkins, Deputy."

Q. I show you Plaintiff's Exhibit "L" for identification.

A. Yes, sir. That is a letter I received from Mr. Stinson.

Plaintiff offers in evidence Plaintiff's Exhibit "L" for identification.

Papers received without objection, and marked Plaintiff's Exhibit "L."

EXHIBIT "L."

"Seattle, Washington, Dec. 10th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: Your wire of the 9th inst., reading: "If tendered, decline acceptance September premium, No. 422198, Phinney," duly received.

This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON."

Across the face appears:

"A. B. Forbes, Dec. 14, 1891. General Agent, S. F."

[Endorsed]: "Plaintiff's Exhibit 'L.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Q. Did you, on or about the 9th day of December, 1891, on receipt of telegraphic instructions from the company, repeat the same to Mr. Stinson, at Seattle, in these words: "If tendered, decline acceptance of September premium 422198"?

A. I presume that is the record there; that is so. We repeated the telegram as we received it from New York.

Q. And you state, as I understand you, that you know nothing of any negotiations looking to the rescission or abandonment of the Phinney policy?

A. No; for this reason: we sent the premium receipt to New York as forfeited. It was notice to the company of all that. Their wires covered all the ground, and then the details had to be left with the agent here.

Q. That settled the matter, so far as you are concerned?

A. That settled the matter, so far as I was concerned. I will say here, it is not an uncommon thing to have people pay the first year's premium and then come in and want to negotiate for time, or something I cannot give them, and they hand over their policies.

Q. Did you ever have any direct correspondence with Mr. Phinney on the subject of his insurance?

A. Never; I think not, sir. Mr. Stinson was my agent.

Q. All you know of this case, then, you derived from reports and correspondence between yourself and Mr. Stinson?

A. Yes, sir; he was my agent, and acted as such.

Q. (By Mr. Gilman.) I understand you, Mr. Forbes, that your different subagents have the right and authority to take up canceled policies?

A. They have.

Q. (By Mr. Burleigh.) Is it a part of the duty of

your subagent to gather up policies which have become forfeited for nonpayment of premium?

A. It is not a part of their duty, but whenever these policies are tendered to them, they are bound to receive them.

Q. Whenever a party comes voluntarily and offers to give it up, you take it?

A. We have no property in it until the party gives it to us.

(Testimony of witness closed.)

Plaintiff offers in evidence, papers heretofore marked for identification Exhibits "M," "N," "O."

Papers received without objection and marked Plaintiff's Exhibits "M," "N," "O," respectively.

EXHIBIT "M."

Seattle, Wash., Aug. 5th, 1891. No. 146.

The Guarantee Loan & Trust Co., pay to F. L. Stinson,
or order,
bearer, \$150.00 (one hundred and fifty dollars.

G. C. PHINNEY.

(Stamped on face.)

"Guarantee Loan & Trust Co., Paid, Aug. 6, 1891, Seattle, Wash."

(Stamped on back.)

"Pay only through the Seattle Clearing House. The Boston National Bank, Aug. 6, 1891. Ten of Seattle."

[Endorsed]: Plaintiff's Exhibit "M." Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.'

EXHIBIT "N."

"The Guarantee Loan & Trust Company (Incorporated).

Seattle, Wash., May 7th, 1891.

No. 255.00.

Pay to F. L. Stinson, or order, \$255.00 (two hundred and fifty-five dollars).

G. C. PHINNEY."

[Endorsed]: "F. L. Stinson."

(Stamped on back): "The Merchants' National Bank, paid May 8, 1894. Four through the Clearing House."

[Also Endorsed]: "Plaintiff's Exhibit 'N.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

EXHIBIT "O."

"Seattle, Wash., Dec. 3rd, 1890.

The Boston National Bank of Seattle, pay to the order of F. L. Stinson \$359.20 (three hundred & fifty-nine & 20-100 dollars).

G. C. PHINNEY."

No. Ins. Premium.

[Endorsed on back]: "F. L. Stinson."

"Plaintiff's Exhibit 'O.' Filed July 26, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

Plaintiff rests.

Under a commission duly issued out of said Circuit Court, the plaintiff caused to be taken the deposition of William J. Easton, the secretary of said company, a resi-

dent of the State of New York, by a commissioner duly appointed for that purpose, a resident in the State of New York, and defendant now read in evidence the said deposition, which was as follows:

Mr. Easton's Deposition.

Q. State you name, residence, and occupation since January 1st, 1890?

A. My name is Wm. J. Easton, and I reside in the city and county of New York. I am now, and have been since January 1st, 1890, the secretary of the Mutual Life Insurance Company of New York. I was secretary prior to that time.

Q. What relation, if any, existed between the Mutual Life Insurance Company of New York, A. B. Forbes, A. B. Forbes & Son, of San Francisco, California, and F. L. Stinson, of Seattle, Washington, at all times between January 1st, 1890, and October 1st, 1893? State fully.

A. Mr. A. B. Forbes was the general agent of the company for the Pacific Coast, which included among others the State of Washington. I am informed that Mr. Forbes' son had some partnership relations with his father, but no relations existed between this company and his son. Between F. L. Stinson and this company no direct relations existed. I am informed that Mr. Stinson acted for Mr. Forbes in various matters.

Q. If in answer to interrogatory four, you say "that F. L. Stinson of Seattle, Washington, represented the said Mutual Life Insurance Company of New York as agent; state fully his powers and duties in every par-

ticular; if his agency was created by writing, attach the original writing or a copy, and properly identify it.

A. Mr. F. L. Stinson had no agency from this company created by writing. I think I have just answered the rest of this question.

Q. Did the Mutual Life Insurance Company of New York in the year 1890 and 1891 have employed an "Inspector of Risks," or persons whose duty it was to report upon the risks being carried in the State of Washington by the Mutual Life Insurance Company of New York? If so, state his name, if more than one, state the names of each.

A. Mr. Stark did report upon risks which were being carried or had been carried at some time in the State of Washington in the latter part of 1891 and 1892. But I do not think he was called an "Inspector of Risks." Lists of risks in existence and risks recently terminated by forfeiture or otherwise were given him to examine.

Q. Did Guy C. Phinney apply for a policy of insurance on the ordinary life plan? A. Yes.

Q. How did it come that the policy issued was a twenty pay life policy? What motive did the company have in requiring or asking the change?

A. Policy issued was a 20 pay life policy, because Phinney wanted it. The company did not require or ask for any change, but Phinney signed our usual form when applicants desire a change.

Q. Please attach originals or copies of all correspondents that passed between the company and its

agents respecting the change from ordinary life to twenty pay life, and properly identify them?

A. I have looked for any correspondence, but there is none. We received the request for the same from the Pacific Coast Agency.

Q. Did the company receive any other report or information of any kind from any source as to the character and habits of said Guy C. Phinney, other than that contained in his application? If so what?

A. Mr. Forbes sent us two letters, true copies of which are the following:

Wilber Manufacturing Agency.

To John H. Elder, Esq., of Seattle, Washn.

Please furnish subscriber No. 78,509, whose card is above attached, answers as full as possible to the following suggestive questions in relation to the financial standing of Guy C. Phinney, of Seattle. Business—banker & broker:

1. What is the financial and business standing of? Good.

2. What are his social habits? Good.

3. Is he temperate in living? Yes.

4. Do you know of anything which will make him ineligible for life insurance? No.

Remarks: He has had some sickness in past year, but nothing serious.

Date:

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Inquiry.

Dear Sir: Please forward by return mail, as per in-

v. Nellie Phinney, Executrix, etc.

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closed stamped envelope, such information as you have regarding the business standing of

Name: Guy C. Phinney.

Business: Banker and broker.

Address: Seattle.

Subscribers name.

Address.

Questions.

Reply.

Please advise financial and all right financially and business standing, also habits, qualities. He perhaps takes his glass of wine, but nothing of a sport about him. I do not like this man at all, but my dislike has its foundation in matters that do not affect his worth as a citizen.

Note.—Subscriber must inclose postage for reply. Attorneys will recognize but one inquiry on each blank. It will be an act of courtesy on the part of the subscribers to give their legal business and collections to the attorneys of this agency.

The originals are in the hands of our lawyers in the West. The original of the letters to which I have just referred came in the first place into my hands as secretary.

Q. Did the Mutual Life Insurance Company of New York instruct any of its agents, especially A. B. Forbes or A. B. Forbes & Son, of San Francisco, California, or F. L. Stinson, of Seattle, not to accept the second premium on said Guy C. Phinney's policy after September 24th, 1891.

A. Not that I am aware of, or find any record of.

Q. Was there any entry or record made in the books of the company prior to September 1st, 1891, which showed, or was intended to show, or indicate to the officers or agents of the said company, that said Guy C. Phinney was not a desirable risk for the company to carry.

A. No; I have looked at the record and do not find any. I do not find any prior to Sept. 1st, 1891, or prior to the date the premium became due and was not paid, which I think was Sept. 24th, 1891.

Q. What negotiations were had, if any, with Guy C. Phinney, looking toward a rescission, waiver, or abandonment of his contract of insurance. State very fully everything said or done by or on behalf of the company looking toward that end.

A. I do not know everything that was said or done by or on behalf of the company, but Mr. Phinney, about the second time the second year's premium was due wanted to know whether notes would be accepted instead of cash, but he was informed that only cash would be accepted. Mr. Phinney thereupon delivered up his policy and did not pay any premium upon it.

Q. What party or parties were employed or requested by the company to look after or obtain a waiver, abandonment, or rescission of the policy on the life of Guy C. Phinney? State fully the instructions given said parties; if in writing, attach a copy of the same to this deposition and properly identify it.

A. I do not know of any instructions, and there are no such writings in my possession.

Q. Attach to your deposition every writing of every

kind or description between the Mutual Life Insurance Company of New York and its agents, or between it and Guy C. Phinney, that in any manner related to or is connected with a waiver, an abandonment, or rescission of the contract.

A. Mr. Forbes reported the premium as unpaid, and the annexed, marked Exhibit "A," is a copy of his report. An entry was also made in the books of the company relating to the waiver, abandonment, and rescission of the contract as follows:

"Forfeited Sept. 25th, 1891. Do not restore. 2nd Vice-President, 28th March, 1892."

The memorandum "do not restore," made by the 2nd vice-president, is one made in the usual course of business, after information has been received in regard to a risk which has terminated. After risks have terminated for various reasons, it is not at all unusual for the insured to apply for a restoration. In such cases a new medical examination is held, and if this examination is satisfactory to the medical department and there is no objection, the policy is restored on payment of the premiums in arrear with interest.

After premium was unpaid, Mr. Stark made these reports to Mr. Forbes:

No. 422,198. Amount, \$100,000.

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, Pres. City National Bank.

Date of investigation, Jan. 22, 1892.

Remarks.

Financially, all right. He is growing very heavy and flabby. His drinking habits are commenting upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

[Signed] STARK.

No. 421,198. Amount, \$100,000.

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, Pres. City Natl. Bank.

Date of investigation, Jan. 22, 1892.

Remarks.

All right fin. but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

[Signed] STARK.

Awaiting particulars.

Q. When was the Mutual Life Insurance Company of New York first informed that a mutual agreement had been consummated between it and Guy C. Phinney, wherein it was mutually agreed that the said policy of insurance on Phinney's life should be waived, abandoned, or rescised? A. In the fall or autumn of 1891.

Q. Give the name of the party or agent that gave the company such information, and attach the original or a copy of the letter, to this deposition, and properly identify it, or if you have not the original, then attach a copy of it.

A. The Pacific Coast Agency; I have looked but do not find letters on this matter.

Q. When was the Mutual Life Insurance Company of New York first informed that said Phinney had surrendered his policy to it? Give the name of the party or agent who so informed the company, and attach the original letter or a copy to this deposition, and properly identify it.

A. My answer to this has been given to you.

Q. What report was made to the company of New York, by either F. L. Stinson, of Seattle, A. B. Forbes or A. B. Forbes & Son, of San Francisco, as to the collection or noncollection of the second premium on the Phinney Policy, No. 422198?

A. Mr. Forbes made a report, a copy of which I have given you in my answer to one of the previous questions.

Q. Please attach to this deposition the original or copy of such report, and properly identify it.

A. I have done this.

Q. In what manner did the policy of Guy C. Phinney, number 422, 198, appear on the books of the company on the 12th day of September, 1893, as to whether it was a live, dead, or terminated policy?

A. This book of the company, which I produce here, has in it the following entries: Forfeited Sept. 25, '91. Do not restore. 2nd Vice-President, 28th March, 1892.

Q. Make a true copy or copies of the entry or entries on such book or books, stating where found, and attach them to this deposition, and properly identify them.

A. I have done so.

Q. If your answer to preceding interrogatories disclose that the policy appeared on the books of the insurance company as a dead or terminated policy, state whether it was designated as a "lapsed" or "forfeited" policy.

A. The word "forfeited" was used. This word is used when a policy is terminated after premium unpaid, or when policy is terminated by nonfulfillment of the assured of any other condition in the policy, or when a policy holder abandons or waives his contract with the company.

Q. Do you know, or can you set forth any other matter, or anything which may be of benefit or advantage to the parties at issue in this cause, or to either of them, or that may be material to the subject of this your examination, or matters in question in this cause? If so, set forth the same fully and at large in your answer.

A. Yes, I can. The date of the Phinney policy is September 24, 1890, and one premium was paid thereon and only one. There was a premium due on September 24th, 1891, which was not paid. On that date, September 24th, 1891, assuming that the age of the insured was 39 years, as I understand it was, the tabular contribution of the above-mentioned premium to the reserve fund of the company was \$1,903.80. Taking \$1,903.80 as a single premium for temporary insurance, assuming that the policy was entitled to be kept in force for a certain time after default in payment of any premium, the period of such extension would consist of 2 years and 36 days. The extension would there expire not later than Nov. 1st, 1892.

I am familiar with the New York statute regarding the interest that shall remain to the policy holder after failure to pay a premium. I have annexed a copy of said statute to my deposition, and marked it Exhibit "B." This statute, as I understand, was passed in 1879, and is still in force.

This statute contemplates the payment of three annual premiums on a policy before an insurance company is required to apply the reserve on the policy to the continuation of the insurance, or to the purchase of a paid-up policy. This company would not have applied the reserve to the purchase of a paid-up policy, nor would the company have paid anything for the surrender of the policy, since only one premium has been paid.

The Phinney policy, after being executed here, was sent to our Pacific Coast Agency for delivery to the insured in Washington, upon payment of premium.

EXHIBIT "A."

The Mutual Life Insurance Company of New York,
In Account with

A. B. Forbes, General Agent,
San Francisco, California.

Premium When Due.	No. of Policy	Amount of Premium	Collection.
September 24, 1891.	422198.	\$3770.	

EXHIBIT "B."

SURRENDER VALUE OF LAPSED OR FORFEITED POLICIES.—Whenever any policy of life insurance issued after January first, eighteen hundred and eighty,

by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American experience table of mortality at the rate of four and one-half per cent per annum shall, on demand made, with surrender of the policy with six months after such lapse or forfeiture, be taken as a single premium on life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of the lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance payable at the same time and under the same conditions, except as to payment of premiums, as the original policy. If no such agreement be expressed in the application or policy, such single premiums may be applied in either of the modes above specified, at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy.

The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American experience table of mortality with interest at the rate of four and one-half per cent per annum after

deducting any indebtedness of the insured on account of any annual or semi-annual or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing.

The net value of the insurance given for such single premium under this section, computed by the standard of this State, shall in no case be less than two-thirds of the entire reserve, computed according to the rule prescribed in this section, after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the corporation.

If the reserve upon any endowment policy applied, according to the provisions of this section, as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term on the conditions on which the original policy was issued.

This section shall not apply to any case where the provisions of the section are specifically waived in the application and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued.

End of the evidence.

Twenty-eighth Exception.

The Court, in its charge to the jury, among other things charged the jury as follows:

"It is contended that the policy was not continuing as a live policy and binding contract at the time of Mr.

Phinney's death on account of this provision in the policy.

"The annual premium of three thousand seven hundred and seventy dollars shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, and on the 24th day of September in every year during the continuance of this contract until premiums for twenty full years shall have been duly paid to said company.

"Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. If this policy shall become void by nonpayment of premiums, all payments previously made shall be forfeited to the company, except as hereinafter provided.'

"It is claimed by the defendant that by reason of the condition in the policy which I have read to you, and the failure of Mr. Phinney in his lifetime to make the payments which matured and became payable on the 24th day of September, 1891, and the 24th day of September, 1892, the policy lapsed, and the rights of Mr. Phinney under it were forfeited, so that it was not a continuing policy at the date of Mr. Phinney's death in 1893.

"Now, gentlemen, the law on this subject is this:

These stipulations and provisions in the contract are controlled by positive statute of the State of New York. This policy was issued by a company doing business in New York, and by its terms the company became obligated to perform its contract in the State of New York, Mr. Phinney agreed to make his payments in New York, and the company was entitled to have proof of the death of Mr. Phinney made at its home office in New York. The State of New York is the place for the performance of the contract, and as to the obligations of the parties with respect to performing the contract on both sides, the laws of the State of New York must be applied.

"The law of the State of New York, therefore, dominates and controls the provisions and stipulations which I have read. The statute of New York which I have referred to makes this provision with reference to the forfeiture of life insurance policies by insurance companies doing business in the State of New York for nonpayment of premiums.

"Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the persons to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or of the assignee of the policy if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, by an agent of such company, or person appointed by it to collect such premium. Such

notice shall further state that unless the said premium or interest when due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and the payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made thirty days limited, therefor, the same shall be taken to be a full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding. But no such policy shall in any case be forfeited, or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice; provided, however, that the notice state when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided at least thirty and not more than sixty days prior to the time when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

It is also a part of the provisions of the same statute that life insurance companies doing business in New York shall not have power to forfeit any life insurance policy for nonpayment of premiums, unless they give this kind of a notice, and comply with this statute in regard to the mailing of the notice, either giving notice in advance of the due date of the premium at least thirty days, and not more than sixty days before the date, or giving the notice afterwards and allowing thirty days from the date of mailing the notice for the payment of the premium.

Without a compliance with this requirement, after the mailing of notice, the laws of New York deprive the insurance company of the power to forfeit the insurance policy. Compliance with this statute is an indispensable preliminary to the forfeiture for nonpayment of premiums, against the will and without the consent of the person insured. Strict compliance is required. If a notice does not contain the matters that the statute specifies must be in the notice, it is not a compliance, and the company would have no power to forfeit an insurance policy by reason of sending such defective notices. If a notice sent in advance, or prior to the date when the premium is due, is mailed twenty-nine days before that date, it is not a legal notice; it does not comply with the statute. If it should be sent sixty-one days before the date on which the premium is due, it would not be a compliance with this statute.

The rights of the insurance company under the terms of this policy and statute of New York would be these: That the company would have a right to insist upon the payment of each annual premium on the date specified in the policy. They have a right, by sending a notice, to exact the payment on that date and to forfeit the policy and all premiums paid for nonpayment on that date. But in order to enjoy that right it is necessary that the statute of New York as to mailing the notice must be complied with. There is no proof in this case that the notice required by the statute of New York was ever sent to Mr. Phinney.

To which said instructions the Court, subsequent to the conclusion of said charge, and while the jury were still

at the bar, defendant duly excepted in writing, and its exception was duly allowed by the Court.

Twenty-ninth Exception.

The Court, in its charge to the jury, among others, gave the following instructions to the jury:

"If the evidence in this case shows that Mr. Phinney did voluntarily, without being induced by false representations or deceit, rescind the contract and give up the policy, rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract."

To which instruction of the Court to the jury, at the conclusion of the charge, and while the jury was still at the bar, defendant duly excepted in writing, on the ground that there was no evidence showing, or tending to show, any fraud, false representations or deceit, and defendant's exception was duly allowed by the Court. The evidence in this cause relating to the rescission of the contract and the surrender of the policy by the assured was as is stated in the twentieth and twenty-third exception herein, and also the following.

The deposition of W. J. Easton, secretary of the company, was introduced in evidence, and among others the following interrogatories and answers thereto were read in evidence:

After premium was unpaid, Mr. Stark made these reports to Mr. Forbes:

No. 422198. Amount, \$100,000.

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, Pres. City National Bank.

Date of investigation, Jan. 22, 1892.

Remarks.

Financially, all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

(Signed)

STARK.

No. 422198. Amount, \$100,000.

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, Pres. City National Bank.

Date of investigation. Forfeited.

Remarks.

All right fin., but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

(Signed)

STARK.

Awaiting particulars.

Q. In what manner did the policy of Guy C. Phinney, number 422198, appear on the books of the company on the 12th day of September, 1893, as to whether it was a live, dead, or terminated policy?

A. This book of the company which I produce here has in it the following entries: Forfeited September 25th 1891. Do not restore, 2nd Vice-President; 28th March, 1892.

Thirtieth Exception.

The Court, in its charge to the jury, among others, gave the following instruction to the jury:

"It is a question of fact, therefore, for you to determine from the evidence in the case whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson with that understanding, and whether relying upon that understanding the defendant subsequently acted."

To which said instruction so given defendant, at the conclusion of the charge, and while the jury were still at the bar, duly excepted in writing, and its exception was duly allowed by the Court. All the evidence in this cause relating to the abandonment or rescission of the contract, and the surrender of the policy by the assured, was as stated in the twentieth and twenty-third exceptions herein.

The following is the charge of the Court to the jury, and the whole thereof:

"Gentlemen of the jury: This is an action to recover the amount claimed to be due upon a policy of insurance on the life of Guy C. Phinney. It is admitted by the pleadings that the defendant company issued the policy that is described in the complaint, and delivered it to Mr. Phinney, and received from Mr. Phinney the amount of \$3770 as a first premium. The issuance and delivery of the policy, and receipt of the first premium,

put in force as an active and binding contract. So much is to be taken for granted in this case, because fully admitted by the pleadings of the parties.

"This contract provides that: 'In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay, at its home office in the city of New York, unto Guy C. Phinney of Seattle, in the county of King, State of Washington, his executors, administrators, or assigns one hundred thousand dollars upon acceptance of satisfactory proofs at its home office of the death of said Guy C. Phinney during the continuance of this policy upon the following conditions, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made a part of the contract.'

"Now, this, gentlemen, is a promise to pay to Mr. Phinney, as provided in other provisions of the contract, if he lives long enough to make the twenty annual payments, or in case of his death during the continuance of the policy to pay the amount of the insurance.

"The vital question in the case is whether the policy was a continuing one, and still a binding contract at the time of Mr. Phinney's death, and at the time of the receipt by the company of proof of Mr. Phinney's death.

"It is contended that the policy was not continuing as a live policy and binding contract at the time of Mr. Phinney's death on account of this provision of the policy:

"The annual premium of three thousand seven hun-

dred and seventy dollars shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the 24th day of September, in every year during the continuance of this contract, until premiums for twenty full years shall have been duly paid to said company.

“Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.’

“It is claimed by the defendant that, by reason of the condition in the policy which I have read to you, and the failure of Mr. Phinney in his lifetime to make the payments which matured and became payable on the 24th day of September, 1891, and the 24th day of September, 1892, the policy lapsed, and the rights of Mr. Phinney under it were forfeited, so that it was not a continuing policy at the date of Mr. Phinney's death in 1893.

“Now, gentlemen, the law on this subject is this: These stipulations and provisions in the contract were controlled by positive statute of the State of New York. This policy was issued by a company doing business in

New York, and by its terms the company became obligated to perform its contract in the State of New York. Mr. Phinney agreed to make his payments in New York, and the company was entitled to have proof of the death of Mr. Phinney made at its home office in New York. The State of New York is the place for the performance of the contract, and as to the obligations of the parties with respect to performing the contract on both sides, the laws of the State of New York must be applied.

"The law of the State of New York, therefore, dominates and controls the provisions and stipulations which I have read. The statute of New York which I have referred to makes this provision with reference to the forfeiture of life insurance policies by insurance companies doing business in the State of New York for non-payment of premiums:

"Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest shall be paid, and the persons to whom the same is payable, shall be duly addressed, and mailed to the person whose life is insured, or of the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, by an agent of such company or person appointed by it to collect such premiums. Such notice shall further state, that unless the said premium or interest, when due, shall be paid by the company, or to a duly appointed agent or other person authorized to col-

lect such premium, within thirty days after the mailing of such notice, the said policy and the payments thereon will become forfeited and void. In case the payments demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be a full compliance with the requirements of the policy in respect to the payment of said premium or interest; anything therein contained to the contrary notwithstanding. But no such policy shall, in any case, be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that the notice state when the premium would fall due, and that, if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least, thirty, and not more than sixty, days prior to the time when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"It is also a part of the provisions of the same statute, that life insurance companies doing business in New York shall not have power to forfeit any life insurance policy for nonpayment of premiums, unless they give this kind of a notice, and comply with this statute in regard to the mailing of the notice, either giving notice in advance of the due date of the premium at least thirty days, and not more than sixty days, before the date, or giving the notice afterwards, and allowing thirty days from the date of mailing the notice for the payment of the premium. Without a compliance with this requirement as to the mailing of notice, the laws of New York deprive the insurance company of the right to forfeit the

insurance policy. Compliance with this statute is an indispensable preliminary to the forfeiture for nonpayment of premiums, against the will and without the consent of the person insured. Strict compliance is required. If a notice does not contain the matters that the statute specifies must be in the notice, it is not a compliance, and the company would have no power to forfeit an insurance policy by reason of sending such defective notice. If a notice sent in advance or prior to the date when the premium is due is mailed twenty-nine days before that date, it is not of any such payment or tender of said premium by plaintiff a legal notice; it does not comply with the statute. If it should be sent sixty days before the date on which the premium is due it would not be a compliance with this statute.

"The rights of the insurance company under the terms of this policy and the statute of New York would be these:

"That the company would have a right to insist upon the payment of each annual premium on the date specified in the policy. They have a right by sending a notice to exact the payment on that date and to forfeit the policy and all premiums paid for nonpayment on that date. But in order to enjoy that right it is necessary that the statute of New York as to mailing the notice must be complied with. There is no proof in this case that the notice required by the statute of New York was ever sent to Mr. Phinney.

"Several defenses have been interposed by the defendant in the answer in this case, as to some of which no

evidence had been offered. You are not to understand by the failure of the defendant to offer evidence as to these defenses that they have been abandoned. In the preliminary stages of settling the issues of this case the Court has made rulings which preclude the defendant from claiming anything under these defenses; because the Court has held that they are insufficient in law to amount to a defense, and under those rulings evidence to sustain them, if offered here, would have been excluded.


"There remain in the case certain defenses which present an issue upon which evidence has been offered, and which require consideration at your hands, and as to which issues you are to decide. This case will turn upon your decision of the questions which I am now going to state to you. First, however, I will say that there has been a contention during the trial and upon the argument as to whether Mr. Phinney paid the second and third premiums. There is no evidence sufficient to warrant a finding that Mr. Phinney did pay any more than the first premium. There is positive evidence that he did not, and there is nothing to rebut that positive evidence that is of sufficient weight to justify the question being submitted to the jury. So you will not waste any time in debating that question. You will take it as a fact in the case that only one premium was paid.

"There has been a good deal of contention in the case as to whether Mr. Stinson was an agent of the company, and the extent of his powers. The pleadings of both parties show that the company had an agent in Seattle, and the proof shows that Mr. Stinson was that agent;

and there is no need of spending any time here debating the question whether Mr. Stinson was an agent of the company. The evidence shows that he was acting in behalf of the company, and the company transacted business through him, and he is to be treated throughout this case as a general agent of the company, having the usual powers of a general agent of a corporation existing under the laws of another State and doing business in this State.

"Now, it is contended that Mr. Phinney and this company, acting through Mr. Stinson as its agent, arrived at an understanding and agreement that the policy should not continue longer in force; Phinney was to pay no more money, and that his rights and the policy were abrogated. Notwithstanding the provision of the statute of New York, that a provision in the policy itself waiving notice has no effect, and that the company can only forfeit the policy for nonpayment of premium by mailing the prescribed notice, still it would be competent, and it was competent for the parties mutually to agree to the cancellation of a life insurance policy if they saw fit to do so. And if the evidence in this case shows that Mr. Phinney did voluntarily, without being induced by any false representations or deceit to give up the policy, rescind the contract and give up the policy rather than continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract. There is testimony in the case tending to prove that Mr. Phinney was unable to meet the second payment when it fell due,

and by reason of his failure to make that payment, he voluntarily delivered up the policy to Mr. Stinson as an agent of the company, with the understanding expressed at the time, that it was lapsed, that it was no longer a continuing contract in his favor. If there was a full and fair understanding between these two men in that matter, and they both treated it as an abrogated and annulled contract, and each relied upon that understanding, it would have the effect to terminate the policy, and the company would have the right to consider itself absolved from any obligation to give the statutory notice in order to forfeit the policy because it would be unnecessary for the company to forfeit by legal proceedings what the opposite party had voluntarily relinquished. It is a question of fact, therefore, for you to determine from the evidence in the case, whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson, with an understanding and whether relying upon that understanding the defendant company subsequently acted.

 "You are the exclusive judges of every question of fact in the case. This important question is a question for you to decide. You are to be governed in deciding it by the testimony in the case. You have a right to base your decision upon any information derived from any other source than the testimony that has been admitted by the Court on the trial, and, so far as there is a conflict in the testimony, you are to aid and decide according to a preponderance of the evidence.

"There is an affirmative defense which the defendant makes, and to have the benefit of this defense, the defendant is required to make it out by proof and to sustain it by at least a fair preponderance of the evidence. The burden of proof as to that question is on the defendant. To have the benefit of this defense, it is necessary that the defendant shall prove to you by at least a fair preponderance of the evidence that there was this mutual agreement and understanding between Phinney and Stinson, and in acting in this matter, Stinson was acting in his capacity as agent of the company and in behalf of the company.

"If you find in favor of the defendant on that issue, your verdict will be for the defendant. If you find for the plaintiff on that issue, the plaintiff will be entitled to a verdict. If entitled to a verdict, the plaintiff will be entitled to an amount of one hundred thousand dollars, with interest on that amount at the rate of six per cent per annum, from the 19th day of July, 1894, after deducting from that amount the amount of unpaid premiums which accrued during Mr. Phinney's lifetime, and interest thereon. The company is entitled to these premiums, even if it has to pay under this policy; it is entitled to the premiums by reason of their nonpayment when due, and it is entitled to interest on the amount of these two premiums; so that if you find in favor of the plaintiff, you will allow the defendant credit for \$3,770, and interest on that amount from the 24th day of September, 1891, until the 19th day of July, 1894, and I fixed that date, the 19th day of July, as the date when the company became obligated to pay; that is, the in-

insurance money was due, if due at all, on that day, because that is the day that the evidence shows that the company first received information of Mr. Phinney's death; and the company would be entitled on that day to deduct the full amount of the unpaid premiums and interest upon that date. You will also allow a credit to be given for \$3,770, and interest on that amount at the rate of six per cent per annum from the 24th day of September, 1892, until July 19, 1894. These two annual premiums, and the interest during the time they were withheld from the company, the company is entitled to take from the amount of its liability, if you find it is liable at all on this contract.

"I have prepared two forms of verdict, which I will send out, and you can use in accordance with your decision."

Thirty-first Exception.

At the conclusion of said charge, the jury retired and deliberated upon their verdict, and subsequently returned into Court for further instructions, and submitted to the Court a list of questions, among which are the following:

Q. If there is no evidence, pro or con, as to a legal notice being given, is the jury to consider this want of evidence as conclusive that no notice was given?

To which the Court answered "yes."

Whereupon, and while the jury was still at the bar, defendant duly excepted in writing to the instruction given by the Court as embodied in said question and

answer, and its exception was duly allowed by the Court.

Thirty-second Exception.

Upon the return of the jury for further instruction, as stated in the thirty-first exception herein, among the list of questions submitted was the following:

Q. Is notice waived when the insured calls on the agent previous to the date of payment, and arranges, or tries to arrange, for the payment of the premium on the due date?

To which the Court answered "no."

Whereupon, and while the jury was still at the bar, defendant, in writing, duly excepted to the instruction given to the jury as embodied in said question and answer, and its exception was duly allowed by the Court.

Thirty-third Exception.

Upon the return of the jury for further instruction, as stated in the thirty-first exception herein, among the list of questions admitted was the following:

Q. Can this notice be waived by the acceptance of the policy?

Whereupon, and while the jury was still at the bar, defendant, in writing, duly excepted to the instruction given to the jury as embodied in said question and answer, and its exception was duly allowed by the Court.

Thirty-fourth Exception.

Upon the return of the jury for further instruction, as stated in the thirty-first exception herein, the following

was among the list of questions submitted by the jury to the Court:

Q. Did the company have the right to ask for a certificate of health, after the due date, from Mr. Phinney at the time he tendered payment of his second premium, according to the New York laws? If so, had they a right to refuse payment until such certificate of health was furnished?

To which question the Court answered "no."

Whereupon, and while the jury was still at the bar, defendant, by its counsel, duly excepted in writing to the instructions given to the jury as embodied in said question and answer, and its exception was duly allowed by the Court.

The questions set forth in the thirty-first, thirty-second, thirty-third, and thirty-fourth exceptions herein, were the only questions submitted by the jury to the Court, and the answers thereto, as stated in said exceptions thirty-one, thirty-two, thirty-three, and thirty-four, constitute the only response made by the Court in answer to said questions.

Exception Thirty-five.

After the Court had answered the questions set forth in exceptions thirty-one, thirty-two, thirty-three, and thirty-four, herein, as stated in said exceptions, and while the jury was still at the bar, defendant requested that the instructions embodied in said questions and answers be modified by a substantial repetition by the Court to the jury of the instructions which the Court

had theretofore given in regard to the abrogation of the contract by agreement between Stinson and Phinney, which request the Court refused, and refused to so modify said instructions, or to modify the same at all, to which refusal of the Court to so modify said instructions, defendant thereupon, and while the jury was still at the bar, duly excepted in writing, and its exception was allowed by the Court.

The jury then retired, and soon after returned with a verdict in favor of the plaintiff for damages in the sum of ninety-seven thousand twelve and 84-100 (\$97,012.84) dollars.

And now, in furtherance of justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and pray that the same may be settled and allowed, and signed and certified by the Judge as provided by law.

E. LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,

Attorneys for Defendant.

Service of the above and foregoing Bill of Exceptions and receipt of a copy thereof, on this 14th day of September, 1895, is hereby admitted.

A. WARBURTON,
A. F. BURLEIGH,

Attorneys for Plaintiff.

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed, and settled, and made a part of the record herein.

Done in open Court, at the June term, 1895, and dated his 17th day of October, 1895.

C. H. HANFORD,

Judge.

[Endorsed]: Bill of Exceptions. Filed Sept. 14, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Settled as the Bill of Exceptions and filed Oct. 17, 1895, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy."

In the Circuit Court of the United States, for the District of Washington, Northern Division, Ninth Circuit.

NELLIE PHINNEY, as Executrix of
the last Will and Testament of GUY
C. PHINNEY, Deceased.

Plaintiff

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK.

Defendant.

No. 418.

Petition for Order Allowing Writ of Error.

The Mutual Life Insurance Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on the 17th day of October, 1895, pursuant to said verdict, whereby it was considered, ordered, and adjudged, that the plaintiff do have and recover of, and from said defendant, the sum of ninety-seven thousand twelve and 84-100 (97012.84)

dollars, with interest and costs, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition, comes now by Edward Lyman Short, Esquire, and Messrs. Strudwick & Peters, and Messrs Stratton, Lewis & Gilman, its attorneys, and prays said Court for an order allowing said defendant to prosecute the Writ of Error to the Honorable, The United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of errors so complained of, under and according to the laws of the United States, in that behalf made and provided; and also, that an order be made, fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that, upon the giving of said security, all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Ninth Circuit; and the transcript of the record, proceedings, and papers in this cause duly authenticated, may be sent to the said United States Circuit Court of Appeals.

And your petitioner will ever pray.

EDWARD LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for the Defendant,
The Mutual Life Insurance
Company of New York.

Dated this 14th day of December, 1895.

In the Circuit Court of the United States, for the District of Washington, Northern Division, Ninth Circuit.

NELLIE PHINNEY, as Executrix of the last Will and Testament of GUY C. PHINNEY, Deceased, Plaintiff,	} No. 418.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

Order Granting Writ of Error and Fixing Amount of Bond

This cause coming on this day to be heard in the courtroom of said Court, in the city of Seattle, Washington, upon the petition of the defendant, The Mutual Life Insurance Company of New York, herein filed, praying for the allowance of a writ of error, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with the assignment of errors also herein filed within due time, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow to said defendant the writ of error prayed for, and

It is ordered that upon the giving by said defendant,

The Mutual Life Insurance Company of New York, of a bond, according to law in the sum of one hundred and twenty-five thousand (\$125,000) dollars, the same shall operate as a supersedeas bond, and all proceedings be stayed pending the determination of said writ of error.

C. H. HANFORD,

Judge.

Dated this 14th day of December, A. D. 1895.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of

the Last Will and Testament of GUY

C. PHINNEY, Deceased,

Defendant in Error.

Assignment of Errors.

Come, now the above-named, the Mutual Life Insurance Company of New York, plaintiff in error herein, by Edward Lyman Short, Esquire, and Messrs. Strudwick & Peters, and Messrs. Stratton, Lewis & Gilman, its attorneys and counsel, and, in connection with its petition for a Writ of Error herein, makes the following Assignment of Errors, and particularly specifies the following as the errors upon which it will rely and which it will urge upon the prosecution of its said Writ of Error

in the above-entitled cause, and which it avers occurred upon the trial of the cause, to wit.

I.

That the United States Circuit Court in and for the District of Washington, Northern Division, erred in sustaining the objection of counsel for defendant in error to the evidence of Dr. J. B. Eagleson, a witness called in behalf of plaintiff in error, and in rejecting the evidence of the said Dr. J. B. Eagleson, the full substance of which said evidence was as follows:

That subsequent to the date when the said Dr. Eagleson first examined the said Guy C. Phinney for insurance in said Mutual Life Insurance Company of New York application was made to him for a certificate of health on the part of Guy C. Phinney, and that the result of this application was communicated to said Phinney.

II.

The said Court erred in sustaining the objection of the defendant in error to the evidence of said Dr. J. B. Eagleson, and in rejecting the evidence of said Dr. J. B. Eagleson, the full substance of which said evidence was as follows:

That F. L. Stinson, general agent of said company for the State of Washington, after September, 1891, made an application to him, as medical examiner of said company, for a certificate of health for Guy C. Phinney, the result of which application was communicated to said Phinney.

III.

That said Court erred in overruling the objection of plaintiff in error to the evidence of A. B. Forbes, a witness called in rebuttal on behalf of defendant in error, and in permitting said witness to testify over said objection, the full substance of which said evidence was as follows:

"Q. Were you instructed or notified by the Mutual Life Insurance Company of New York not to accept the second premium on the Phinney policy, No. 422198 after September 24, 1891? A. I was."

IV.

That said Court erred in overruling the objection of plaintiff in error to the evidence of said A. B. Forbes, a witness called in rebuttal in behalf of the defendant in error, and in permitting the said witness to testify as follows over said objection, the full substance of which said evidence was as follows:

"Q. Did you give like notice and instruction to F. L. Stinson, or forward to him any such instructions and notice given by the company with reference to the Guy C. Phinney policy? A. I did."

V.

That said Court erred in overruling the objection of plaintiff in error to the introduction in evidence by the defendant in error of the letter marked Exhibit "K," and in admitting the same in evidence. The said letter is substance, as follows:

Seattle, Washington, Nov. 26th, 1891.

A. B. Forbes, Esq., Gen'l Agt.,

Dear Sir: In compliance with your request, I regret having to return the undernoted renewal receipts:

August.

No. 114293 Curtis	No. 393675 Rogers
415957 Cushing	416309 Rice
418420 Calhoun	420062 Benson
441063 Raymore	441073 Patterson

September.

51342 Janney	270465 McKay
287091 O'Connor	307195 Mohr
373328 Finch	373530 Heaton
375371 Buttner	412636 Anderson
418608 Monroe	422198 Phinney
434207 Behrman	offered to (pay, but in (ill health.

Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipts asked for) will be reported in next acct.

Yours, very truly,

F. L. STINSON."

VI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy (\$3770) dollars should be paid by Guy C. Phin-

ney, the assured, annually on the 24th day of September, during the continuance of said contract, until premium for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney, died on September 12th, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract, the premium falling due on September 24, 1891, and by reason of said nonpayment of premium by said assured, the said policy became and was void and of no effect after said date, and you are directed to find a verdict for the defendant."

VII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance and upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof, that a premium of thirty-seven hundred and seventy (\$3770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September during the continuance of said contracts until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said

premium by the assured at the time stipulated, was necessary to maintain the validity of said contract. It is admitted in this action, that Guy C. Phinney died on September 12th, 1893. The evidence in this cause establishes the fact that the assured, Guy C. Phinney, did not pay to the defendant, at the time mentioned in said contract, the premium falling due on September 24th, 1892, and by reason of said nonpayment of premium by said assured, the said policy became of no effect after said date, and you are directed to find a verdict for the defendant."

VIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy (\$3770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of this contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893. The evidence of this cause establishes the fact that the assured, Guy C. Phin-

ney, did not pay nor tender to defendant, at the time stipulated in said contract, the premium falling due on September 24, 1892, and by reason of said nonpayment or tender of premium by said assured, the said policy became and was void and of no effect after said date; and you are directed to find a verdict for the defendant."

IX.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy (\$3770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in said contract, the premium falling due September 24, 1891, such nonpayment by the said assured, would render the said policy void and of no effect after said date. And

if you find the facts so to be, you will find a verdict for the defendant."

X.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The jury are instructed that it appears from the policy of insurance sued upon by the plaintiff in this action, which bears date September 24, 1890, that it was a condition thereof that a premium of thirty-seven hundred and seventy (\$3770) dollars should be paid by Guy C. Phinney, the assured, annually on the 24th day of September, during the continuance of said contract, until premiums for twenty (20) full years should have been paid. You are instructed that said condition was of the essence and substance of the contract, and that the payment of said premium by the assured at the time stipulated was necessary to maintain the validity of said contract. It is admitted in this action that Guy C. Phinney died on September 12th, 1893. If you find from the evidence in this case that the assured, Guy C. Phinney, did not pay to the defendant at the time mentioned in the contract the premium falling due September 24, 1892, you are instructed that said nonpayment by the said assured would render the said policy void, and of no effect after said date, and if you find the facts so to be you are directed to find a verdict for the defendant."

XI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that it appears from the face of said policy, that it contained the following clause as one of the provisions and requirements, and conditions thereof: "Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived."

"And you are instructed that said waiver by the assured, Guy C. Phinney, of the sending of any notice required by any statute, was effectual and binding upon said assured, and is effectual and binding upon the plaintiff in this action; and that by reason of said waiver, it was not incumbent upon the defendant, in order to declare or claim a forfeiture of said policy by reason of the nonpayment of premiums according to the terms of said policy, to send to the assured the notice mentioned and required by the laws of the State of New York for the year 1876, chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321, which is relied upon by the plaintiff, even if said statute were otherwise applicable to this contract."

"And you are further instructed by reason of said waiver, that failure to send statutory notice did not operate to prevent the forfeiture of said policy pursuant to its terms, by reason of the nonpayment of premiums falling due thereon, and if you find from the evidence, that Guy C. Phinney, the assured did not pay to defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the result if you find he

did not pay the premium falling due thereon September 24th, 1892."

XII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that it appears from the application, policy, and pleadings in this action, that Guy C. Phinney, the assured, was a resident of the State of Washington, and at all times therein mentioned, and that the application for said policy was signed by said Guy C. Phinney in said State; that said policy, with the application, which constituted a part thereof, completely set forth the contract between the defendant and the assured."

"You are further instructed that said application provides that said policy 'shall not take effect until the first premium shall have been paid, and the policy shall have been delivered.'"

"You are further instructed that it appears from said pleadings that the first premium upon said policy was paid in Seattle, Washington, and that said policy was, by defendant, delivered to assured at the same place.

"You are therefore further instructed that the policy sued upon in this action never became a complete contract, binding upon either party to it, until the delivery of the policy and the payment of the first premium in the State of Washington; and that said policy is, therefore, a Washington contract, and is governed by the laws of said State of Washington, and not by the laws of the

State of New York. And that the law of New York hereinbefore referred to, and relied upon by plaintiff, is not applicable to and does not govern this contract. And if you find from the evidence that Guy C. Phinney, the assured, did not pay to defendant the premium falling due upon said policy, according to its terms, September 24th, 1891, your verdict should be for the defendant; and the same would be the result if you find he did not pay the premium falling due thereon September 24, 1892."

XIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death on September 12th, 1893.

"And you are further instructed that the plaintiff, executrix, was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant."

XIV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that upon any theory of this case the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death, on September 12th, 1893.

"And you are further instructed that the plaintiff, executrix, was not entitled to begin or maintain this action, and that her right of action against the said defendant did not accrue until she had paid or tendered to defendant the amount of this past due premium.

"You are further instructed that there is no evidence of any such payment or tender of said premium by plaintiff to defendant prior to the beginning of this action, and you are directed to find a verdict for the defendant."

XV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the premium under this policy maturing September 24, 1891, was unpaid at the time of Guy C. Phinney's death, on September 12th, 1893, then you are instructed that the plaintiff, executrix, is not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past due premium. If you find from the evidence that said premium was still unpaid, and that the amount thereof had never been tendered by the plaintiff to the defendant prior to the beginning of this action, your verdict should be for the defendant."

XVI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the premium under this policy maturing September 24, 1892, was unpaid at the time of Guy C. Phinney's death, on September 12th, 1893, then you are instructed that the plaintiff, executrix, is not entitled to begin or maintain this action; that her right of action against the defendant did not accrue until she had paid or tendered to the defendant the amount of this past due premium. If you find from the evidence that said premium was still unpaid, and the amount thereof has never been tendered by the plaintiff to the defendant prior to the beginning of this action, your verdict should be for the defendant."

XVII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that no waiver of the payment of the due premium, or of its tender, can avail the plaintiff, unless such waiver, with all the facts alleged to constitute the same, are alleged in the complaint of the plaintiff, or in her reply; and there being no such facts pleaded, no evidence on such points can be considered by you, notwithstanding the statute of New York of 1876 and 1877, relied upon by the plaintiff, and there being

no testimony of such fact, you are instructed to find a verdict for the defendant."

XVIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The plaintiff in her complaint in this action alleges performances of the conditions of the policy sued on, on her part, and on the part of Guy C. Phinney. I charge you that under the said contract one of the conditions to be performed by the said Guy C. Phinney was the payment of the premiums falling due on September 24, 1891, and September 24, 1892; and the plaintiff cannot recover in this action without establishing the allegations of her complaint, performance under such contract, namely, the payment of said premiums, and if you find from the evidence in this action that the premium of 1891 or the premium of 1892 was not paid by said Guy C. Phinney, then your verdict must be for the defendant."

XIX.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"You are instructed that the said statute of New York for 1876 is local in its nature, and applies only to assured or their assigns residing in the State of New York; and that the said statute has no application to and does not govern the contract sued upon in this action; and if you further find from the evidence that the assured, Guy C.

Phinney, failed to pay either the premium maturing September 24, 1891, or the premium maturing September 24, 1892, then you are directed to find a verdict for the defendant."

XX.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"You are further instructed that said law of New York hereinbefore referred to, and which is relied upon by plaintiff, in so far as it is attempted to be construed to impose the duty of sending notices to residents outside of the State of New York, in connection with policies which became completed contracts, either within or without the State of New York, and in so far as it may be construed not to permit any waiver of sending such notices by contract between the parties thereto, is invalid, for the reason that it is in violation of and repugnant to the Constitution of the United States, because said statute so construed would be a denial to this defendant by the States of New York and Washington of the equal protection of their laws, and would be a deprivation by said States of the property of defendant without due process of law, and would be a regulation of commerce in the several States, and would be interfering with the sovereignty of the State of Washington, and would affect property and business without the jurisdiction of the State of New York; and because said law so construed violates the Constitution of the United States in that it is a law impairing the obligation of contracts, and, under the rights, titles, and privileges and

immunities which belong to the defendant under the Constitution of the United States, it was not obliged to send notices to the assured under this policy.

"And if you find from the evidence that Guy C. Phinney, the assured, did not pay to the defendant the premium falling due upon said policy, according to its terms, September 24, 1891, your verdict should be for the defendant; and the same would be the case if you find that he did not pay the premium falling due upon the policy September 24, 1892."

XXI.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"Notwithstanding the requirements of the statute of New York that notices in a particular form and at a time prescribed shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited, yet if the jury finds from the evidence that the defendant sent a notice to the said Guy C. Phinney, although said notice was not in the form, nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said premium, came to the representative of the company, and requested further time in which to pay said premium, and such extension of time was refused by said representative, and the said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and

that said premium was not paid, nor tendered by, or on behalf of, said Phinney at its maturity, then you are invalid notice; and a waiver on the part of said Phinney of and of the representative of the company, would constitute a recognition by said Phinney of the notice sent as a valid notice; and a waiver on the part of said Phinney of the notices in the form, and at the same time required by the New York statute, if the same were otherwise applicable. If you so find the facts to be, you must find a verdict for the defendant."

XXII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"Notwithstanding the requirements of the statute of New York that notices in a particular form and at the time prescribed shall be sent by life insurance companies before they shall have power to declare a policy of life insurance forfeited, yet if the jury find from the evidence that the defendant sent a notice to the said Guy C. Phinney, although such notice was not in the form, nor at the time prescribed by the statute, and in response to said notice the said Guy C. Phinney, before the maturity of said premium, came to the representative of the company, and requested further time in which to pay said premium, and such extension of time was refused by said representative, and said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, and the said Phinney thereupon stated that he was unable to pay said premium, and

that said premium was not paid, nor tendered by, or on behalf of said Phinney at its maturity, then you are instructed that such notice so sent and acted upon would constitute a sufficient compliance with the provisions of the statute of New York, in regard to the sending of notice, although the said notice was not in the form prescribed, nor at the time required by said statute; and if you find the facts so to be, you are directed to find a verdict for the defendant."

XXIII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case that the said Phinney did not pay the premium falling due September 24, 1891, and by his subsequent course led the defendant to believe that he considered his policy forfeited, and that he no longer relied thereon, as a binding contract, and that he had abandoned the same, then his executrix would be estopped from now asserting the validity of said policy in this action; and if you find the facts so to be, you will find a verdict for the defendant."

XXIV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence that said Phinney did not pay or tender the premium falling due on September 24, 1891, and that his course of conduct with the defend-

ant prior to his death, and the course of dealing with the defendant of the plaintiff subsequent to his death, are inconsistent with the idea that they or either of them relied upon the policy as a valid contract, and such as to lead the defendant to believe that no reliance was placed by them in said policy as a valid contract, and that the same had been abandoned, the plaintiff would be estopped from now asserting the validity of said contract, and if you so find the facts to be, you must find a verdict for the defendant."

XXV.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence that the said Guy C. Phinney stated to defendant's representatives in the State of Washington, that he could not pay his premium falling due on the 24th day of September, 1891, it was equivalent to his saying that he could not go on with the contract, and that he abandoned the same, and if you find that the defendant assented thereto, then this would end the contract; and if you so find the facts to be, you must find a verdict for the defendant."

XXVI.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"If you find from the evidence in this case, that the said Guy C. Phinney stated to the representative of the

defendant in the State of Washington, that he could not pay the premium falling due September 24, 1891, and that he did not pay nor tender the same, and that he thereafter surrendered said policy to the defendant's representatives, they mutually believing and understanding that the same was of no force or validity then or thereafter, by reason of the nonpayment of the said premium, this would constitute an abandonment and rescission of this contract by both parties thereto, and would put an end to the same; and if you find the facts so to be, you must find a verdict for the defendant."

XXVII.

That the said Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

"The statute of New York relied upon by the plaintiff, relieves against a forfeiture without the sending of a proper notice in a single instance only, it does not contemplate successive defaults, nor does it in a particular case relieve the assured of more than one default. The assured cannot go on, year after year, without the payment of premiums, and have his policy still kept alive by the statute, and if successive defaults occur the policy is forfeited, notwithstanding the provisions of the law of New York of 1876 and 1877, and only in a proper case, the policy holder is entitled to the benefit of the Act of New York of 1879 relating to the surrender value of policies forfeited.

"And if you find from the evidence that Guy C. Phin-

ney did not pay the premium of 1892, you must find a verdict for the defendant."

XXVIII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"Upon all the evidence in this case, you are instructed to find a verdict in favor of the defendant."

XXIX.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"It is contended that the policy was not continuing as a live policy and binding contract at the time of Mr. Phinney's death, on account of this provision in the policy:

"The annual premium of three thousand seven hundred and seventy dollars shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office, in the city of New York, and on the 24th day of September in every year during the continuance of this contract until premiums for twenty (20) full years shall have been duly paid to said company.

"Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the de-

livery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. If this policy shall become void by nonpayment of premiums, all payments previously made shall be forfeited to the company, except as hereinafter provided.

"It is claimed by the defendant that, by reason of the conditions in the policy which I have read to you, and the failure of Mr. Phinney in his lifetime to make the payments which matured and became payable on the 24th day of September, 1891, and the 24th day of September, 1892, the policy lapsed, and the rights of Mr. Phinney under it were forfeited, so that it was not a continuing policy at the date of Mr. Phinney's death, in 1893.

"Now, gentlemen, the law on this subject is this: These stipulations and provisions in the contract are controlled by positive statute of the State of New York. This policy was issued by a company doing business in New York, and by its terms the company became obligated to perform its contract in the State of New York. Mr. Phinney agreed to make his payments in New York, and the company was entitled to have proof of the death of Mr. Phinney made at its home office in New York. The State of New York is the place for the performance of the contract, and, as to the obligations of the parties with respect to the performing the contract on both sides, the laws of the State of New York must be applied.

"The law of the State of New York, therefore, dominates and controls the provisions and stipulations which I have read. The statute of New York which I have re-

ferred to make this provision, with reference to the forfeiture of life insurance policies by insurance companies doing business in the State of New York, for nonpayment of premiums:

“Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premiums or interest shall be paid, and the persons to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or of the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest, when due, shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and the payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be a full compliance with the requirements of the policy in respect to the payment of the said premium or interest, anything therein contained to the contrary notwithstanding. But no such policy shall in any case be forfeited, or declared forfeited, or lapsed until the expiration of thirty days after the mailing of such notice; provided, however, that the notice state when the premium will fall due, and that, if not paid, the policy

and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty, and not more than sixty, days prior to the time when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"It is also a part of the provisions of the same statute that life insurance companies doing business in New York shall not have power to forfeit any life insurance policy for nonpayment of premiums, unless they give this kind of a notice and comply with this statute in regard to the mailing of the notice, either giving notice in advance of the due date of the premium at least thirty days, and not more than sixty days, and not more than sixty days before the date, or giving the notice afterwards and allowing thirty days from the date of mailing the notice for the payment of the premium. Without a compliance with this requirement, after the mailing of notice, the laws of New York deprive the insurance company of the power to forfeit the insurance policy. Compliance with this statute is an indispensable preliminary to the forfeiture for nonpayment of premiums against the will and without the consent of the person insured. Strict compliance is required. If a notice does not contain the matters that the statute specifies must be in the notice, it is not a compliance, and the company would have no power to forfeit an insurance policy by reason of sending such defective notice. If a notice sent in advance or prior to the date when the premium is due is mailed twenty-nine days before that date, it is not a legal notice, it does not comply with the statute. If it

should be sent sixty-one days before the date on which the premium is due, it would not be a compliance with the statute.

The rights of the insurance company under the terms of this policy and statute of New York would be these: That the company would have a right to insist upon the payment of each annual premium on the date specified in the policy. They have a right, by sending a notice, to exact the payment on that date, and to forfeit the policy and all premiums paid for nonpayment on that date. But in order to enjoy that right it is necessary that the statute of New York, as to mailing the notice, must be complied with. There is no proof in this case that the notice required by the statute of New York was ever sent to Mr. Phinney.

XXX.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"If the evidence in this case shows that Mr. Phinney did voluntarily, without being induced by false representations or deceit, rescind the contract and give up the policy rather than continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy, so that it would no longer be a continuing contract."

XXXI.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"It is a question of fact, therefore, for you to determine from the evidence in the case whether there was a full, complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson with that understanding, and whether, relying upon that understanding, the defendant subsequently acted."

XXXII.

That said Court erred in giving the following instruction to the jury, after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (By the Jury.) If there is no evidence pro or con, as to a legal notice being given, is the jury to consider this want of evidence as conclusive that no notice was given?

A. (By the Court.) Yes."

XXXIII.

That said Court erred in giving the following instruction to the jury, after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (By the Jury.) Is notice waived when the insured calls on the agent previous to the date of payment, and arranges, or tries to arrange, for the payment of the premium on the due date?

A. (By the Court.) No."

XXXIV.

That the said Court erred in giving the following instruction to the jury, after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (By the Jury.) Can this notice be waived by the acceptance of the policy?

A. (By the Court.) No."

XXXV.

That said Court erred in giving the following instruction to the jury, after they had retired to consider their verdict, and upon their return into Court for further instructions:

"Q. (By the Jury.) Did the company have a right to ask for a certificate of health, after the due date, from Mr. Phinney, at the time he tendered payment of his second premium according to the New York laws? If so, had they a right to refuse payment until such certificate of health was furnished?

A. (By the Court.) No."

XXXVI.

That said Court erred in refusing the request of plaintiff in error to modify the instructions embodied in the questions and answers shown in the assignments of error numbered XXXII, XXXIII, XXXIV, and XXXV, by substantial repetition by the Court to the jury of the instruction, which the Court had theretofore given in re-

gard to the abrogation of the contract of insurance, by agreement between the agent of the company and the assured.

XXXVII.

That the said Court erred in refusing to grant the motion made by plaintiff in error to the rendition of judgment in said cause, which motion was as follows, to wit:

"Comes now the defendant in the above-entitled action, and moves the Court as follows:

1.

That the judgment in the above-entitled action be arrested, and that the Court refuse to enter judgment on the verdict herein, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof, or of the parties to said action.

2.

That the Court dismiss the above-entitled action, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court has no jurisdiction thereof, or of the parties to said action.

3.

That the Court will render judgment in favor of the defendant, and against the plaintiff, for the dismissal of this action, notwithstanding the verdict herein, for that it manifestly appears by the record, proceedings, and testimony taken in the above-entitled cause that this Court

has no jurisdiction thereof, or of the parties to said action.

This motion is based upon the files, records, and proceedings of this Court in the above-entitled cause, and upon all the testimony and evidence introduced upon the trial thereof."

XXXVIII.

That said Court erred in refusing to grant the motion made by plaintiff in error for a new trial of said cause.

XXXIX.

That said Court erred in rendering and giving that certain judgment in said cause, made and entered on the 17th day of October, 1895, whereby it was ordered and adjudged by said Court that said Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased, do have and recover of the Mutual Life Insurance Company of New York the sum of ninety-seven thousand twelve and 84-100 (\$97,012.84) dollars, with interest and costs.

Wherefore, The said The Mutual Life Insurance Company of New York, plaintiff in error, prays that the said judgment of the Circuit Court of the United States for the District of Washington, Northern Division, be reversed, and that said Court be directed to grant a new trial of said cause.

EDWARD LYMAN SHORT,

STRUDWICK & PETERS,

STRATTON, LEWIS & GILMAN,

Attorneys for Plaintiff in Error, The Mutual Life Insurance Company of New York, Defendant in the Lower Court.

In the Circuit Court of the United States, for the District of Washington, Northern Division, Ninth Circuit.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of Guy
C. Phinney, Deceased.

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Defendant.

No. 418.

Bond on Writ of Error.

Know all Men by These Presents: That the Mutual Life Insurance Company of New York, defendant above named, as principal, and E. C. Neufelder, James R. Hayden, S. Frauenthal, and John Leary, all of Seattle, Washington, as sureties, are held and firmly bound unto Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased, plaintiff above named, in the full and just sum of one hundred and twenty-five thousand (\$125,000) dollars, to be paid to the said plaintiff, her attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, jointly and severally, by these presents.

Scaled with our seals, and dated this 14th day of December, 1895.

The condition of the above obligation is such,

That whereas, lately, at a session of the Circuit Court

of the United States, for the District of Washington, Northern Division, in a suit pending in said Court, between the said Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased, as plaintiff, and The Mutual Life Insurance Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, as defendant, a final judgment was rendered against the said defendant in the sum of ninety-seven thousand twelve and 84-100 (\$97,012.84) dollars, with interest and costs;

And whereas, the said defendant has obtained from the said Court, a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff is about to be issued, citing and admonishing her to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit to be held at San Francisco, in the State of California.

Now, therefore, if the said, The Mutual Life Insurance Company of New York, shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation is to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE COM-

PANY OF NEW YORK, [Seal]

By Abraham M. Engle, Agent.

E. C. NEUFELDER, [Seal]

JAMES R. HAYDEN, [Seal]

S. FRAUENTHAL, [Seal]

JOHN LEARY. [Seal]

United States of America,
District of Washington, Northern Division, } ss.
King County.

E. C. Neufelder, James R. Hayden, S. Frauenthal, and John Leary, sureties in the foregoing bond, being each duly sworn, each for himself deposes and says:

That he is a freeholder in said district, and the said E. C. Neufelder, that he is worth the sum of seventy-five thousand dollars (\$75,000) dollars; and the said S. Frauenthal that he is worth the sum of fifty thousand dollars (\$50,000) dollars; and the said James R. Hayden that he is worth the sum of ten thousand dollars (\$10,000) dollars; and the said John Leary that he is worth the sum of fifty thousand dollars (\$50,000.00) dollars, all exclusive of property exempt from execution, and over and above all debts and liabilities.

E. C. NEUFELDER,
JAS. R. HAYDEN,
S. FRAUENTHAL,
JOHN LEARY,

Subscribed and sworn to before me this 14th day of December, 1895.

[Seal]

R. V. ANKENY,
Notary Public in and for the State of Washington, Residing at Seattle.

The sufficiency of the sureties of the foregoing bond approved by me this 14 day of December, 1895.

C. H. HANFORD, Judge.

*In the United States Circuit Court of Appeals in and for
the Ninth Circuit.*

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of
Guy C. Phinney, Deceased,

Defendant in Error.

No. 418.

United States of America, }
Ninth Judicial Circuit. } ss.

Citation. (COPY.)

The President of the United States, To Nellie Phinney,
as Executrix of the Last Will and testament of Guy
C. Phinney, Deceased, Greeting:

You are hereby cited and admonished to be and appear
at the United States Circuit Court of Appeals for the
Ninth Circuit, to be holden at the city of San Francisco,
in the State of California, on the 11th day of January,
1896, pursuant to a writ of error, filed in the clerk's of-
fice of the Circuit Court of the United States, for the
District of Washington, Northern Division, in that cer-
tain action wherein The Mutual Life Insurance Company
of New York is plaintiff in error and you are defendant
in error, to show cause, if any there be, why the judg-
ment rendered against said plaintiff in error, as in said

Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of December, in the year of our Lord, eighteen hundred and ninety-five, and of the Independence of the United States, the one hundred and twentieth.

C. H. HANFORD,

United States District Judge, sitting as U. S. Circuit Judge, Ninth Circuit, District of Washington.

Service of the within citation and receipt of a copy thereof admitted this 14th day of Dec., 1895.

S. WARBURTON,

A. F. BURLEIGH,

Attorneys and Counsel for Nellie Phinney, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased.

*in the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, as Executrix of
the last Will and Testament of GUY
C. PHINNEY, Deceased.

Plaintiff

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK.

Defendant.

No. 418.

Northern Division, King County.

District of Washington,

United States of America,

ss.

Marshal's Return to Citation.

I, James C. Drake, United States Marshal, for the Dis-
trict of Washington, do hereby certify that I received
the annexed citation on the 14th day of December, A.
D. 1895, and on the same day duly served, the same upon
Nellie Phinney, executrix of the last will and testament
of Guy C. Phinney, deceased, by delivering to and leaving
with said Nellie Phinney, executrix of the last will and
testament of Guy C. Phinney, deceased, personally, in
King County, District of Washington, Northern Divis-
ion, a full, true, and correct copy of said citation, certi-
fied to by the clerk of the Circuit Court of the District
of Washington, Northern Division, under the seal of said
court, to be a correct copy of said citation.

Witness my hand, this 18th day of December, A. D.
1895.

JAMES C. DRAKE,

United States Marshal for the District of Washington.

By James M. Quilter, Deputy.

Marshal's fees, \$4.24-100.

*In the United States Circuit Court of Appeals, in and for
the Ninth Circuit.*

THE MUTUAL LIFE INSURANCE

COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of

the Last Will and Testament of GUY

C. PHINNEY, Deceased,

Defendant in Error.

No. —

United States of America, }
Ninth Circuit. } ss.

Writ of Error. (COPY)

The President of the United States, to the Honorable,
the Judges of the Circuit Court of the United States,
for the District of Washington, Northern Division,
Greeting:

Because, in the record and proceedings, as also in the
rendition of the judgment of a plea which is in the said
Circuit Court, before you, or some of you, between the
Mutual Life Insurance Company of New York, defend-
ant and plaintiff in error, and Nellie Phinney, as execu-

trix of the last will and testament of Guy C. Phinney, deceased, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco, in the State of California, on the 11th day of January next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of December, 1895, and of the Independence of the United States, the one hundred and twentieth.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth
Circuit, District of Washington.

[Seal Circuit Court] By R. M. Hopkins, Deputy Clerk.

Allowed: C. H. HANFORD, Judge.

Dated this 14th day of December, 1895.

Received a true copy of the foregoing Writ of Error for defendant in error.

Dated this 14th day of December, 1895.

A. REEVES AYRES,

Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.

By R. M. Hopkins, Deputy Clerk.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

NELLIE PHINNEY, Executrix of the
Estate of GUY C. PHINNEY, De-
ceased,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
Defendant.

No. 418.

United States of America, }
District of Washington. } ss.

Clerk's Certificate to Transcript.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, do hereby certify the foregoing three hundred and forty-seven (347) written and printed pages, numbered from one (1) to three hundred and forty-seven (347), inclusive, to be a full, true, and correct copy of the record, papers, and all proceedings had in the foregoing

entitled cause, as the same remains of record and on file in the office of the clerk of said Circuit Court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of preparing and certifying the foregoing transcript of record is the sum of two hundred and eleven & 70-100 dollars (\$211.70), and that the same has been paid to me by Strudwick & Peters, attorneys for the plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 4th day of January, A. D. 1896.

[Seal]

A. REEVES AYRES,

Clerk of the United States Circuit Court, District of
Washington. By R. M. Hopkins,

Deputy Clerk.

*In the United States Circuit Court of Appeals, in and for
the Ninth Circuit.*

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of
GUY C. PHINNEY, Deceased.

Defendant in Error.

No. —

United States of America, } ss.
Ninth Circuit.

Writ of Error. (ORIGINAL)

The President of the United States, to the Honorable
the Judges of the Circuit Court of the United States
for the District of Washington, Northern Division,
Greeting:

Because, in the record and proceedings, as also in the
rendition of the judgment of a plea which is in the said
Circuit Court, before you, or some of you, between the
Mutual Life Insurance Company of New York, defendant
and plaintiff in error, and Nellie Phinney, as executrix of
the last will and testament of Guy C. Phinney, deceased,
plaintiff and defendant in error, a manifest error hath
happened, to the great damage of the said The Mutual
Life Insurance Company of New York, plaintiff in error,
as by its complaint appears:

We, being willing that error, if any hath been, should

be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco, in the State of California, on the 11th day of January next, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of December, 1895, and of the Independence of the United States, the one hundred and twentieth.

[Seal]

A. REEVES AYRES,

Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.

By R. M. Hopkins,

Deputy Clerk.

Allowed by

C. H. HANFORD,

Judge.

Dated this 14th day of December, 1895.

Received a true copy of the foregoing Writ of Error for defendant in error.

Dated this 14th day Dec., 1895.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth
Circuit, District of Washington.

By R. M. Hopkins,
Deputy Clerk.

[Endorsed]: No. 418. In the United States Circuit Court, for the District of Washington. Nellie Phinney, as Executrix of the Estate of Guy C. Phinney, Plaintiff, vs. The Mutual Life Insurance Company of New York. Writ of Error. Edward Lyman Short, Strudwick and Peters, Stratton, Lewis and Gilman, Attorneys for Defendant.

*In the United States Circuit Court of Appeals in and for
the Ninth Circuit.*

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,
vs.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of
GUY C. PHINNEY, Deceased.

Defendant in Error.

United States of America, }
Ninth Judicial Circuit. } ss.

Citation. (ORIGINAL)

The President of the United States, to Nellie Phinney, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 11th day of January, 1896, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action wherein The Mutual Life Insurance Company of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of December, in the year of our Lord, eighteen hundred and ninety-five, and of the independence of the United States, the one hundred and twentieth.

C. H. HANFORD,

United States District Judge, sitting as U. S. Circuit Judge, Ninth Circuit, District of Washington.

Service of the within citation and receipt of a copy thereof admitted, this 14th day of Dec., 1895.

S. WARBURTON,

A. F. BURLEIGH,

Attorneys and counsel for Nellie Phinney, as executrix of the last will and testament of Guy C. Phinney, deceased.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

NELLIE PHINNEY, as Executrix of the Last Will and Testament of GUY C. PHINNEY, Deceased.	}	No. —
Plaintiff,		
vs.		
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	}	
Defendant.		

United States of America,	}	ss.
District of Washington, Northern Division,		
King County.		

Marshal's Return to Citation.

I, James C. Drake, United States Marshal for the District of Washington, do hereby certify that I received the annexed citation on the 14th day of December, A. D. 1895, and on the same day duly served the same upon Nellie Phinney, executrix of the last will and testament of Guy C. Phinney, deceased, by delivering to and leaving with said Nellie Phinney, executrix of the last will and testament of Guy C. Phinney, deceased, personally, in King County, District of Washington, Northern Division, a full, true and correct copy of said citation, certified to by the clerk of the Circuit Court of the District of Washington, Northern Division, under the seal of said court, to be a correct copy of said citation.

Witness my hand this 18th day of December, A. D.
1895.

JAMES C. DRAKE,
United States Marshal for the District of Washington.
By James M. Quilter, Deputy.

Marshal's fees, \$4.24.

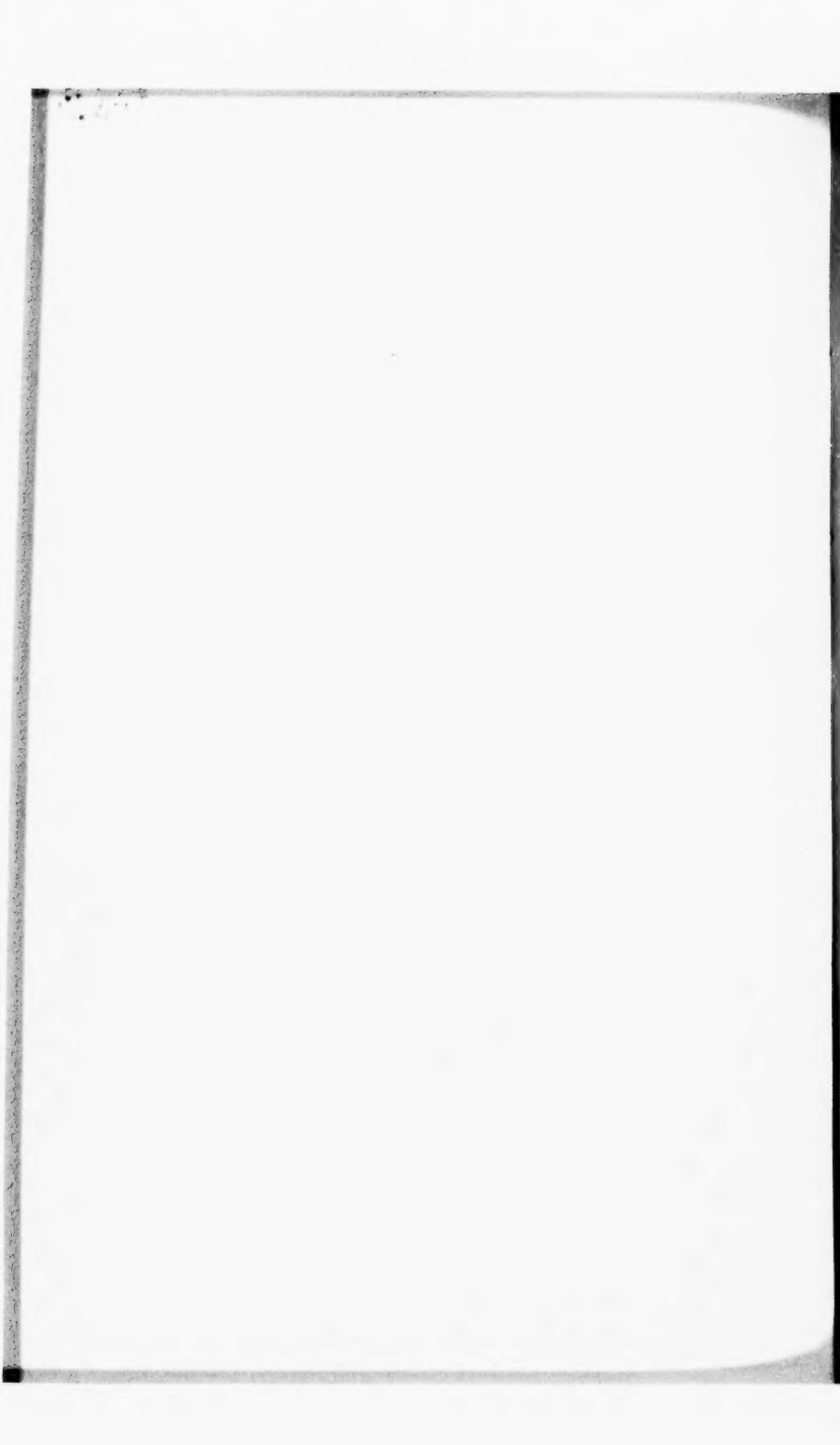
[Endorsed]: Original. No. 418. In the United States
Circuit Court for the District of Washington. Nellie
Phinney, as Executrix, v. The Mutual Life Insurance
Company of New York. Citation.

EDWARD LYMAN SHORT,
STRUDWICK & PETERS,
STRATTON, LEWIS & GILMAN,
Attorneys for Defendant.

[Endorsed]: No. 274. United States Circuit Court of
Appeals for the Ninth Circuit. Transcript of Record.
In error to the United States Circuit Court for the Dis-
trict of Washington, Northern Division. The Mutual
Life Insurance Company of New York, Plaintiff in Error,
v. Nellie Phinney, Executrix of the Estate of Guy C.
Phinney, deceased, Defendant in Error.

Filed January 7th, 1896.

F. D. MONCKTON,
Clerk.



PROCEEDINGS

IN THE

UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE NINTH CIRCUIT.

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United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs.	} No. 274.
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phinney, Deceased.	

Motion to Dismiss.

Comes now the defendant in error, by her counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for manifest, manifold irregularities and informalities in the papers and proceedings in error, viz., because:

1. There is no technical nor proper return to said writ of error.

2. Neither the petition for the writ of error, nor the assignment of errors, nor the order granting writ of error and fixing amount of bond, nor the bond upon said writ of error, nor the citation upon said writ of error, was filed with the clerk of the Court below.

And the said defendant in error, by counsel as aforesaid, also moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction, because:

1. No proper or legal citation on said writ of error was issued or served; and

2. Said writ of error was not filed in the court below.

This motion will be made upon the record herein.

S. Warburton,

Of Counsel for Defendant in Error.

LORENZO S. B. SAWYER,

Counsel for Defendant in Error for the purposes of these motions.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, Executrix of the
Estate of Guy C. Phinney, Deceased.

No. 274.

To Edward Lyman Short, Strudwick & Peters, Stratton,
Lewis & Gilman, Esquires, Counsel for Plaintiff in
Error:

Please take notice that on Monday, the 4th day of May,
1896, at the opening of the court, or as soon thereafter as
counsel can be heard, at the courtroom of said court, in
the city and county of San Francisco, State of California,
the motions of which the foregoing are copies will be ar-

gued and submitted to the United States Circuit Court of Appeals for the Ninth Circuit, for the decision of the said Court thereon.

S. WARBURTON,

Of Counsel for Def. in Error.

LORENZO S. B. SAWYER,

Counsel for the Defendant in Error for the purposes of the motions.

[Endorsed]: Motion to Dismiss. Received copy of the within this April 3, 1896. Strudwick & Peters, Atty. for Appellant. Filed May 4, 1896. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of Guy
C. Phinney, Deceased,

Defendant in Error.

No. 274.

**Motion for Leave to Amend the Certificate and Return of
the Clerk of the Circuit Court.**

Comes now the Mutual Life Insurance Company of New York, the plaintiff in error herein, and hereby

moves the Court for an order, directing the clerk of the Circuit Court of the United States for the District of Washington, Northern Division, to amend his return to the writ of error herein and certificate to the transcript of the record, so that the same shall in all respects conform to the statutes and rules of this Court, in such case made and provided.

This motion is based upon the files and records in this Court in this cause, and upon the affidavit of R. M. Hopkins filed herewith.

E. LYMAN SHORT,
STRATTON, LEWIS & GILMAN,
STRUDWICK & PETERS,

Attorneys for Plaintiff in Error.

[Endorsed]: Motion for Leave to Amend the Certificate and Return of Clerk. Filed May 4, 1896. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,
vs.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of Guy
C. Phinney, Deceased,
Defendant in Error.

No. 274.

United States of America, }
District of Washington, } ss.
Northern Division, }

Affidavit of R. M. Hopkins.

R. M. Hopkins, being first duly sworn, upon his oath
says:

I am a deputy clerk of the Circuit Court of the United
States for the District of Washington; that A. Reeves
Ayres, Esquire, is the clerk of said Court; that said A.
Reeves Ayres has his permanent residence in the city of
Tacoma, in the Western Division of said District of
Washington; that for more than five years last past I
have been, and am now, as such deputy clerk, in sole
charge and control of the office of said clerk, in the north-
ern division of said district, and as such deputy perform
all of the duties of clerk of the Circuit Court in said di-
vision.

That I, as such deputy, made the return to the writ of error herein, and the certificate appearing on pages 400 and 401 of the printed record herein; that said certificate is in the form uniformly used by me for five years last past in making returns to writs of error.

That, as a matter of fact, the transcript constituting the return made by me to the writ of error herein, contains everything prescribed by the statutes of the United States and the rules of this Court to be contained in returns to writs of error, to-wit:

An authenticated transcript of the record, the assignment of errors, and a prayer for reversal with a citation to the defendant in error; also a true copy of the record, opinion of the Court, the bill of exceptions, assignment of errors, and all proceedings in the cause.

That should this Honorable Court deem the certificate made by me, as deputy aforesaid, in any way insufficient or informal, I desire leave to correct the same, and make, as deputy aforesaid, and have attached to said record, a new certificate in accordance with the facts, as stated by me in this affidavit, and the requirements which this Honorable Court may make.

That for such purpose I have made and delivered to the attorney for the plaintiff in error herein an amended certificate, which I request, in case my former certificate be found insufficient, may be attached to the record sent up herein as a return to the writ of error.

R. M. HOPKINS.

Subscribed and sworn to before me this 28th day of April, A. D. 1896.

[Seal]

W. PARRY SMITH,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Affidavit of R. M. Hopkins. Filed May 4, 1896. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of Guy
C. Phinney, Deceased,

Defendant in Error.

No. 274.

United States of America,
District of Washington,
Northern Division,
King County,

ss.

Affidavit of R. M. Hopkins.

R. M. Hopkins, being first duly sworn, upon his oath says:

I am a deputy clerk of the United States Circuit Court for the District of Washington, Northern Division; that

A. Reeves Ayres, Esquire, is the clerk of said court; that as such deputy clerk I have sole control, supervision, and management of said clerk's office in the Northern Division in the District of Washington, said office being situate in the city of Seattle, in said division.

That the writ of error herein was sued out on the 14th day of December, 1895, at which time I was in control of said clerk's office as aforesaid, as such deputy; that at the time said writ of error was sued out the following proceedings were had, and matters and things transpired as I now relate them, to-wit:

Messrs. R. C. Strudwick and L. C. Gilman, attorneys for the plaintiff in error, presented to me in my office the petition for order allowing writ of error, a copy of which appears on pages 360 and 361 of the printed record herein, and therewith the assignment of errors, a copy of which appears in the printed record from pages 363 to 391 inclusive, and the aforesaid papers were, at said time, by the persons aforesaid delivered to and lodged and filed with me as such deputy clerk, and I then and there indorsed the same as filed.

That within a very few minutes thereafter the aforesaid attorneys presented to me at my office aforesaid the order granting writ of error, and fixing the amount of bond, a copy of which appears at pages 362 and 363 of the printed record herein, which said order at said time had been signed by the Honorable C. H. Hanford, Judge of said court; and also the bond, a copy of which appears in the printed record, at pages 392 to 394, inclusive, which at said time has been approved by the before mentioned

Judge. The said attorneys at said time delivered to and filed and lodged with me said papers, and each of them, and I then and there indorsed the same as filed by me on said day.

That said petition, assignment of errors, order granting writ of error, and fixing the amount of bond, and said bond, are each and all now on file in my said office, and they and each of them bear the following indorsement:

"Filed December 14th, 1895. In the U. S. Circuit Court. A. Reeves Ayres Clerk. By R. M. Hopkins, Deputy Clerk."

That if said indorsements do not appear in the copy of the record returned by me, with the writ of error herein, it is due solely to my own inadvertence in copying the same.

That immediately upon the filing of said order and bond, I, at the request of said attorneys, issued the writ of error herein, a copy of which appears in the printed record at pages 398 and 399, and delivered said writ to R. C. Strudwick, one of said attorneys, who took the same from my office.

That a few minutes thereafter the said Strudwick returned to my office, and delivered to and lodged and filed with me, said writ of error, with the allowance thereof indorsed thereon by the before mentioned Judge, and at the same time delivered to and lodged and filed with me a copy of said writ for the use of defendant in error.

That said original writ of error remained in my office and in my custody from said 14th day of December, 1895,

until the 4th day of January, 1896, at which time I transmitted the same, with my return thereto, to this Honorable Court.

That the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the District of Washington, on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this Honorable Court, together with the writ of error and return thereto on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the Circuit Court of Appeals to be indorsed by the clerk of said Court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me as above stated.

R. M. HOPKINS.

Subscribed and sworn to before me this 28th day of April, A. D. 1896.

[Seal]

W. PARRY SMITH,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Affidavit of R. M. Hopkins. Filed May 4, 1896. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of
the last Will and Testament of GUY
C. PHINNEY, Deceased.

Defendant in Error.

No. 274.

United States of America,

District of Washington,

Northern Division,

King County.

ss.

Affidavit of James M. Quilter.

James M. Quilter, being first duly sworn, upon his oath
says:

I am, and was at all times herein mentioned, a deputy
United States Marshal, for the District of Washington.

That on the 14th day of December, A. D. 1895, R. C.
Strudwick, one of the attorneys for the plaintiff in error
herein, delivered to me for service the citation herein, a
copy of which appears on pages 395 and 396 of the printed
record, with instructions to make service thereof upon de-
fendant in error, and return the same to the clerk's office
of the Circuit Court of the United States for the District
of Washington, Northern Division.

That I served said citation on the same day it was delivered to me, as appears by the return made by me, a copy of which appears in the printed record herein at pages 397 and 398.

That on the 18th day of December, 1895, I returned said citation, by delivering to and lodging and filing the same with said clerk in his office, in the city of Seattle, with my return attached thereto.

JAMES M. QUILTER.

Subscribed and sworn to before me this 28th day of April, 1896.

[Seal]

W. PARRY SMITH,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Affidavit of James M. Quilter. Filed May 4, 1896. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth District.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. NELLIE PHINNEY, as Executrix of the Last Will and Testament of Guy C. Phinney, Deceased, Defendant in Error.	}	No. 274.
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United States of America, District of Washington, Northern Division, King County.	}	ss.
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Affidavit of R. C. Strudwick.

R. C. Strudwick, being first duly sworn, upon his oath says:

I am one of the attorneys for the plaintiff in error in the above-entitled cause; that I have been continuously the attorney for the plaintiff in error in said cause from the time the same was commenced in the Circuit Court of the United States for the District of Washington, Northern Division, up to and including the present time, and at all said times have been actively engaged in the management and control of said cause.

That at the time the writ of error was sued out herein, to-wit, on the 14th day of December, A. D. 1895, the following facts occurred and proceedings were had in the Circuit Court of the United States, for the District of Washington, Northern Division, as I now state them, to-wit:

On said day, accompanied by L. C. Gilman, Esquire, one of my associate counsel, in said cause, I went to the office of the clerk of said court, and there delivered to and filed with R. M. Hopkins, the duly appointed and constituted deputy clerk of said court, the petition for order allowing writ of error, a copy of which appears on pages 360 and 361 of the printed record herein, and with said petition I also delivered to and filed with said clerk the assignment of errors, a copy of which appears in the printed record herein, from pages 363 to 391, inclusive; and said papers, and each of them, were then and there filed with said clerk, and said clerk indorsed thereon at said time that the same were filed.

That thereupon, and immediately thereafter, I, and my said associate counsel, went into open Circuit Court then being held and presided over by the Honorable C. H. Hanford, District Judge of the District of Washington, sitting as Circuit Judge, for said district, and presented the order, a copy of which appears at pages 362 and 363 of the printed record herein, and the bond, a copy of which appears in the printed record herein at pages 392 to 394 thereof, inclusive; that thereupon said Judge signed said order by affixing his name thereto, and approved said bond by making and signing the indorsement thereon, at page 394 of the printed record.

I then immediately, accompanied by my said associate

counsel, returned to the clerk's office, and filed therein said order and said bond so signed and approved, by delivering to, lodging, and leaving with R. M. Hopkins above mentioned, in his said office, said order and bond signed and approved as aforesaid; and said R. M. Hopkins indorsed said papers, and each of them, as filed on said day.

That thereupon, at the request of this affiant, the clerk of said Circuit Court, acting through the aforesaid R. M. Hopkins, as his deputy, issued under the seal of the Court, and delivered to me, the original writ of error, now on file herein, a copy of which appears at pages 398 to 400, inclusive, of the printed record herein; that myself and my said associate counsel immediately returned to open court, as aforesaid, and presented said writ of error to the before-mentioned Judge, who indorsed thereon his allowance as the same appears at page 399 of the printed record herein. Myself and my said associate counsel then immediately returned to said clerk's office, and then and there filed said writ of error with said clerk, by delivering to, lodging, and leaving with the aforementioned R. M. Hopkins, deputy clerk, the aforesaid writ of error, and also at the same time filed with and delivered to said R. M. Hopkins, as said deputy clerk, a true copy of said writ of error, for the use of the defendant in error.

That then, myself and my associate counsel immediately presented to the before-mentioned Judge the citation, a copy of which appears at pages 395 and 396 of the printed record, and said Judge signed the same; and I then delivered said citation to one James M. Quilter, a

deputy United States Marshal for the District of Washington, with instructions to duly serve and return the same; and he, on the same day served the same upon the defendant in error, as appears from the return of said marshal, a copy of which appears at pages 397 and 398 of the printed record herein.

I also caused a copy of said citation to be served upon the attorneys for defendant in error, who admitted service thereon, as appears from the printed record at page 396.

That said citation was by said marshal, as this affiant is informed and believes, returned to and filed with the clerk of said Court on the 18th day of December, 1895.

R. C. STRUDWICK.

Subscribed and sworn to before me this 27th day of April, 1896.

[Seal]

R. M. HOPKINS,

Clerk of the United States District Court for the District of Washington.

[Endorsed]: Affidavit of R. C. Strudwick. Filed May 4, 1896. F. D. Monckton, Clerk.

At a stated term, to-wit, the October term, A. D. 1895, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the fourth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

Honorable WILLIAM W. MORROW, District Judge.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,
vs.
NELLIE PHINNEY, Executrix, etc. }

Order Continuing Motion to Dismiss.

By consent of L. C. Gilman, Esquire, and Lorenzo S. B. Sawyer, Esquire, counsel for the respective parties, it is ordered that the motion to dismiss herein be, and the same is, continued to the June session, 1896.

It is further ordered that the cause be assigned to be heard on June 2nd.

At a stated term, to-wit, the October term, A. D. 1895, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the Courtroom, in the City and County of San Francisco, on Monday, the second day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable WILLIAM B. GILBERT, Circuit Judge.

Honorable ERSKINE M. ROSS, Circuit Judge.

Honorable THOMAS P. HAWLEY, District Judge.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, Executrix, etc.

No. 274.

Ordered motion to dismiss cause, and cause argued by Lorenzo S. B. Sawyer, Esquire, counsel for the defendant in error, and motion, and by John B. Allen, Esquire, counsel for the plaintiff in error, and against motion, and continued to eleven o'clock A. M., to-morrow for further argument.

*In the Circuit Court of the United States, District of Wash-
ington, Northern Division.*

Law Register, United States Circuit Court, District of
Washington, Northern Division, Volume 1, pages
134, 157, 164, 167, 169 and 178.

NELLIE PHINNEY, Executrix

vs.

THE MUTUAL LIFE INSURANCE
CO. OF NEW YORK.

} No. 418.

Pleadings Filed and Or- —Clerk's Fees.—

1894.	ders. Made.	Plaintiff.	Defendant.
Sept. 24,	Filed and entered complaint and appearance,		.70
	Filed and entered praecipe for and issued summons	2.20	
	Issued certified copy of com- plaint, 18 fols.	4 30	
25,	Filed and entered summons returned,	50	
Oct. 18,	Filed and entered appear- ance and motion to strike		.70
	Filed and entered stipula- tion as to time to plead,		.20
Nov. 1.	Filing and entering notice		.20

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14,	Filing and entering notice	.20	
	Filing and entering inter- rogatories,	.20	
20,	Entering order motion to strike denied, etc.	.30	
26,	Filed and entered demurrer		
Dec. 1,	Filing and entered notice to call up demurrer	.20	
	Entering order demurrer overruled exceptions, etc., twenty days to answer,	.30	
	Entering order for motion for inspection of policy denied	.20	
	Filing and entering affidavit Nellie Phinney	.20	
26,	Filing and entering answer		.20
28,	Filing and entering demur- rer	.20	
	Filing and entering notice	.20	
1895.			
Jan. 1,	Filing and entering notice (2) and interrogatories	.60	
7,	Filing and entering notice and motion	.20	
	Entering order granting leave to amend complaint	.30	
16,	Filing and entering com- plaint as amended	.20	
24,	Filing and entering answer to amended complaint		.20

25,	Filing and entering notice of appearance	.50
26,	Filing and entering demurrer	.20
	Filing and entering exceptions	.20
	Filing and entering notice and motion	.20
28,	Filing and entering notice and demurrer	.20
Mch. 18,	Filing and entering notice	.20
21,	Entering order to amend answer,	.30
	Entering order on demurrer under advisement	.30
26,	Filing and entering opinion	.20
	Entering order for demurrer sustained, twenty days to amend answer,	.30
Apr. 15,	Filing and entering amended answer	.20
23,	Filing and entering reply	.20
	Filing and entering motion	.20
	Filing and entering interrogatories, affidavit, and motion	.20
25,	Filing and entering motion to strike	.20
May 3,	Filed and entered exceptions to interrogatories (proposed) (2)	40

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4,	Filed and entered order settling interrogatories, (2) two fol. each,	1.60
	Filed and entered notice of settling interrogatories,	.20
21,	Filed and entered motion of plaintiff for commission to take deposition	.20
	Entering order to issue commission	.30
24,	Issuing commission to take deposition, (2)	4.00
	Preparing and certifying plaintiff's interrogatories, 15 fols.	3.70
31,	Filed and entered order denying motion to strike part of reply, 1 fol.	.50
Jun. 3,	Filed and entered demurrer of defendant to parts of reply,	.20
14,	Filed and entered notice of argument of demurrer,	.20
	Filed and entered depositions sealed Forbes et al,	.20
15,	Filed and entered motion to strike from trial calendar,	.20
17,	Entering order to publish deposition of June 14,	.30
	Filed and entered deposition as published	.20

	Entering order on demurrer of plaintiff's reply over- ruled—exceptions,	.30
	Entering order denying mo- tion to strike from the calander	.30
July 1,	Filed and entered motion to produce insurance policy	.20
	Filed and entered notice and motion to file second amended answer,	.20
	Filed and entered second amended answer	.20
	Filed and entered order to produce insurance policy, 2 fols.	.80
	Entering order associating Stratton, Lewis & Gilman, as counsel for defendants.	.30
3,	Filed and entered stipula- tion to publish deposi- tion	.10 .10
	Filed and entered deposition as published,	.20
9,	Filed and entered affidavit of W. S. Pond,	.20
10,	Filed and entered praecipe for and issued subpœna,	.70
12,	Filed and entered subpœna returned	.20
July 16,	Filed and entered reply to second amended answer,	.20

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	Filed and entered notice to produce papers	.20
	Filed and entered notice to produce papers	.20
18,	Filed and entered praecipe for and issued subpoena,	.70
22,	Filed and entered notice and motion for continuance,	.20
	Filed and entered affidavit of R. D. Coutant et al. (sup- port of motion)	.20
	Filed and entered order de- nying motion for continu- ance	.50
	Filed and entered affidavit of Nellie Phinney (resist- ing motion for continu- ance)	.20
23,	Filed and entered praecipe for and issued subpoena	.70
	Filed and entered praecipe for and issued subpoena	.20
	Filed and entered subpoena returned	.20
	Filed and entered praecipe for and issued subpoena	.70
	Filed and entered subpoena returned	.20
25,	Filed and entered subpoena returned,	.20
	Entering record first day's trial,	.60

	Filing exhibits "A" to "G,"		
	"I," "J," "K," plaintiff,	2.00	
	Filing exhibits No. 1, de-		
	fendant		.20
26,	Entering record second day's		
	trial	.30	
	Filing exhibits "H," "I,"		
	"M," "N," "O," plaintiff,	1.00	
	Filing exhibits 2 to 8 inches,		
	defendant		1.40
27,	Entering record third and		
	final days' record	.30	
	Filed and entered instruc-		
	tions asked by plaintiff		
	and defendant	.20	.20
	Filed and entered verdict,		
	Judgment for plaintiff		
	\$9,7012.84,	.20	
29,	Filed and entered order to		
	withdraw exhibits for use		
	of stenographer	.25	.25
	Filed and entered order ex-		
	tending time to file affi-		
	davits,		.50
	Filed and entered notice of		
	motion for new trial,		.20
	Filed and entered motion for		
	new trial		.20
30,	Filed and entered order to		
	extend time to prepare,		
	serve and file bill of ex-		
	ceptions,		.50

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Aug. 10,	Filed and entered motion to dismiss and for judgment,	.20
	Filed and entered affidavit of R. C. Strudwick and W. A. Shannon, (2)	.40
16,	Filed and entered notice to call up motion of dismissal,	.20
19,	Filed and entered motion for new trial continued indefinitely	.50
26,	Filed and entered order extending time to prepare, serve, and file bill of exceptions,	.50
Sep. 14,	Filed and entered bill of exceptions,	.20
19,	Filed and entered order and stipulation extending time in re bill of exceptions,	.25
28,	Filed and entered objections to defendants proposed bill of exceptions,	.20
Oct. 1,	Filed and entered notice of settlement of bill of exception,	.20
3,	Filed and entered order extending time to settle bill of exceptions	.20
5,	Entering order motion to dismiss and motion for new trial submitted	.30

7,	Entering order for motion to dismiss and for new trial denied, exceptions	.50
16,	Filed and entered order ex- tending time to settle bill of exceptions,	.50
17,	Filed and entered judgment, 2 fols.	.80
	Filing bill of exceptions as settled,	.20
	Filed and entered order set- tling bill of exceptions 10 fols.	3.20
25,	Filed and entered cost bill,	.20
31,	Filed and entered objections to cost bill	.20
Nov. 20,	Filed and entered notice of taxation of costs,	.20
25,	Filed and entered notice and motion to retax costs,	.20
Dec. 2,	Filed and entered order on taxation of costs, 1 fol.	.50
	Filed and entered affidavit for writ of garnishment,	.20
3,	Issued writ of garnish- ment,	2.00
	Issued two certified copie of same for marshal, fols. each	3.00
	Filed and entered motion, application for writ of garnishment	.20

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Filed and entered praecipe
for writ of garnishment, .20

14, Filed and entered order
overruling writ of garn-
ishment, 1 fol. .50

Filed and entered assign-
ment of errors .20

Filed and entered petition
for order for writ of error .20

Filed and entered order al-
lowing writ of error .80

Filed and entered bond on
writ of error, 6 fols 2.00

Issued writ of error 5.00

Issued citation 2.00

Filed and entered praecipe
for transcript, (2) .20

17, Filed and entered writ of
garnishment returned, .50

31, Preparing and certifying
transcript for defendant in
error 736 fols. 147.90

1896.

Jan. 2, Preparing and certifying
transcript for plaintiff in
error, 1055 fols at 20 cents,
ctf. 70 cents. 211.70

United States of America, }
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, do hereby certify that the foregoing four (4) typewritten pages numbered from one (1) to four (4), inclusive, is a full, true, and correct transcript of Law Register United States Circuit Court, District of Washington, Northern Division, volume 1, pages 134, 157, 164, 167, 169, and 178, in the office of the clerk of said Circuit Court of Seattle, Washington, and that the same is a true record of every and all items of clerk's fees charged in the case of Nellie Phinney, executrix, vs. The Mutual Life Insurance Co. of New York, being cause No. 418 in said Circuit Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at Seattle, Washington, this 29th day of April, 1896.

[Seal.]

A. REEVES AYRES,
Clerk.

By R. M. Hopkins,
Deputy Clerk.

[Endorsed]: Transcript of Law Register. June 3, 1896. F. D. Monckton, Clerk.

At a stated term, to-wit, the October term, A. D. 1895, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Wednesday, the third day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable WILLIAM B. GILBERT, Circuit Judge.

Honorable ERSKINE M. ROSS, Circuit Judge.

Honorable THOMAS P. HAWLEY, District Judge.

THE MUTUAL LIFE INSURANCE
COMPANY,

Plaintiff in Error, } No. 274.

vs.

NELLIE PHINNEY, Executrix, etc., }

Ordered cause further argued by John B. Allen, and Robert Sewell, Esquire, counsel for the plaintiff in error, and by Stanton Warburton, Esquire, and Andrew F. Burleigh, Esquire, counsel for the defendant in error, and submitted, to the Court for consideration and decision.

*In the United States Circuit Court of Appeals, in and for
the Ninth Circuit.*

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, Executrix of the
Estate of Guy C. Phinney, Deceased.

Defendant in Error.

No. 274.

Error to the Circuit Court of the United States, for the
District of Washington, Northern Division.

Opinion.

Before GILBERT and ROSS, Circuit Judges, and HAW-
LEY, District Judge.

ROSS, Circuit Judge, delivered the opinion of the
court:

We are prevented from considering the interesting
questions of law arising upon the merits of this case by
the fact that the record fails to show that the writ of
error sued out herein was filed in the court below.

It is, among other things, provided by the act of Con-

gress creating the Circuit Courts of Appeals and defining their jurisdiction, that "no appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed" and that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error." (Sec. 11. Act of March 3, 1891, 26 Stats. 826-829.)

The writ of error is the writ of the appellate court, and it has long been well settled that it is not brought or sued out within the meaning of the statute providing that means of reviewing a judgment at law until it is filed in the court which rendered the judgment. "It is the filing of the writ that removes the record from the inferior to appellate court," is the declaration of the Supreme Court as early as the year 1850, and which has been repeated in numerous cases. (*Brooks v. Norris*, 11 How. 203-207; *Mussina v. Cavazos*, 6 Wall. 355; *Scarborough v. Pargoud*, 108 U. S. 567; *Polleys v. Black River Co.*, 113 U. S. 81; *Credit Company, Limited v. Arkansas Central Railway Co.*, 128 U. S. 260. See, also, *Warner v. T. & P. Railroad Co.*, 54 Fed. Rep. 920; *Stevens v. Clark*, 62 Fed. Rep. 321.)

As the filing of the writ in the court below is essential to the transfer of the jurisdiction of the case from that

court to this, it is clear that, until that is done, this court is without jurisdiction to entertain the case.

Upon the writ of error found in the record is this indorsement: "Received a true copy of the foregoing writ of error for defendant in error. Dated this 14th day of December, 1895. A. Reeves Ayres, Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington. By R. M. Hopkins, Deputy Clerk." This is the only thing in the printed record to indicate that the writ of error ever reached the clerk of the court below—the statement being that the clerk received a copy of the writ "for the defendant in error." This was but the statutory mode of serving the writ on the adverse party, pursuant to the provisions of section 1007 of the Revised Statutes, which reads: "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation, but if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases, where a writ of error may be a supersedeas, executions shall not issue until the expiration of (the said term of sixty) ten days."

Such lodgment of a copy of the writ with the clerk for the defendant in error does not do away with or take the

place of the essential requirement of filing the writ in the court below, without which the appellate court acquires no jurisdiction of the case. The writ of error, as held by the Supreme Court in *Hodge v. Williams*, 22 How. 87, is not mere matter of form, but matter of substance, prescribed by law, and essential to the jurisdiction of the appellate court. That the latter court has no appellate power over the judgment of the trial court unless that judgment is brought up in the manner provided by the act of Congress, is thoroughly settled. And that the writ here in question was not filed in the court below not only appears from an inspection of the original writ, which has been sent, as it should have been, with the record of this court, but the same fact also appears (although in a negative form) from a certified copy of the law register of the court below, which has been presented and filed on this motion, and from one of the affidavits of the deputy clerk of the court below having charge of the office from which the record comes. In this affidavit, while the deputy clerk states that one of the attorneys for the plaintiff in error filed with him the original writ of error, it is manifest, on reading and considering the entire affidavit, that that was only the affiant's construction of what was done. After stating that one of the attorneys for the plaintiff in error "delivered to and lodged and filed with me" the original writ with the allowance thereof indorsed thereon by the judge, and at the same time "delivered to and lodged and filed" with him a copy of the writ for the use of the defendant in error, the affidavit proceeds: "That said original writ of error remained in my office and in my custody from said 14th day of December, 1895, until the 4th day of January, 1896, at which time I transmitted the same with my

return thereto to this honorable court; that the original citation herein, a copy of which appears on pages 395 and 396 of the printed record herein, was returned to and filed with me by a deputy marshal of the United States for the District of Washington on the 18th day of December, 1895, and the same remained in my office and in my custody and control from said date until the same was transmitted to this Honorable Court, together with the writ of error and return thereto on the 4th day of January, 1896. It has not been my custom to indorse original citations and writs of error at the time they are filed with or served upon me, for the reason that I have deemed the same as writs of the Circuit Court of Appeals, to be indorsed by the clerk of said court upon his receipt of the same with my return thereto; but, as a matter of fact, the writ of error and citation herein were actually delivered to and filed and lodged with me, as above stated."

It is quite evident, we think, from this affidavit, as well as from the copy of the law register of the court below, that the actual fact is not inconsistent with the record as presented; which fails to show that the writ of error was there filed.

It is urged on behalf of the plaintiff in error that, as the original writ was left or lodged with the clerk, it was, in legal effect, filed in the court; that the indorsement is but the evidence of the filing, and that, as the original writ was, in fact, left or lodged with the clerk, it was as much filed in the court as if it had been indorsed as filed by him.

It may be that in some instances and for some purposes the mere deposit of a paper by a party or his attorney with the clerk of the court, and his receipt thereof, of itself constitutes a "filing." The case of *Tregambo v. The Comanche Mill and Mining Co.*, 57 Cal. 510, relied upon, among others, by the plaintiff in error, presented the question of the entry of the default of the defendant to the suit under these circumstances: The attorneys of the parties to the action resided in Bodie, twenty miles away from the county seat of Mono county, at which place was the office of the clerk of the court. On the 20th of April, 1879, the defendant's attorneys forwarded to the clerk of the court to be filed certain demurrers to the complaint, copies of which had been served on the plaintiff's attorneys, together with notice that the demurrers would be called for argument on May 2, 1879. The demurrers were regularly delivered to the clerk of the court on April 29, 1879. He received them without demanding his fees for filing them, but about six o'clock P. M. of May 1, 1879, defendants' attorneys received a letter from the clerk informing them that he demanded payment of his fees for filing the demurrers. On the morning of the 2nd of May, defendants' attorneys left Bodie for the county seat, and arrived there the same day about noon. Immediately upon their arrival they tendered to the clerk his fees, but he refused to receive them, because he was then in the act of entering the defendants' default for not answering. The court said:

"We think the District Court should have set aside a default entered under such circumstances. When the demurrers were placed in the custody of the clerk, he had a legal right to refuse to file them, unless the fees for that

service were paid to him. (Cal. Codes, Stats. in Force, sec. 765; Pol. Code, sec. 4332.) But he did not refuse, nor did he demand any fees then or afterward for filing the demurrers. Three or four days after he received them for filing, he demanded by letter \$66 as fees on filing twenty-two demurrers in said case. But there was no law which allowed \$3 as a fee for filing a demurrer; the demand was therefore unauthorized by law. Having failed to demand his fees for filing the demurrers at the time they were delivered to him to be filed, or at any time thereafter, he waived his personal privilege of requiring prepayment. There is no question but that a clerk of a court may waive a right created by statute. (*Lick v. Madden*, 25 Cal. 203.) When, therefore, the demurrers were brought and deposited with the clerk for filing, they were, in contemplation of law as to the defendant, on file in the case. A paper in a case is said to be filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause. (*Engleman v. State*, 2 Ind. 91.) Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office. Indorsing it with the time of filing is not a necessary part of filing. (*Bishop v. Cook*, 13 Barb. 326.) When filed, it is considered an exhibition of it to the court, and the clerk's office in which it is filed represents the court for that purpose. (*Lamson v. Falls*, 6 Ind. 309.)

Burrill's Law Dictionary defines "filing" as follows: "Delivering the paper (indorsed with the title of the cause and attorney's name) to the clerk of the court in which the action is pending, who marks it 'filed,' adding

the date, and deposits it under the proper head among the papers or files in his office."

Other lexicographers define it thus: "To file a paper on the part of a party is to place it in the official custody of the clerk. To *file* on the part of the clerk is to indorse upon the paper the date of its reception and retain it in his office, subject to inspection by whomsoever it may concern." (Webster's International; Burrill.)

In the English chancery practice a bill is not deemed filed until it receives the proper indorsement of the clerk. (Daniel's Chan. Prac. and Plead., 6th Am. Ed., star page 399.)

In *Pinders v. Yager*, 29 Ia. 468, it was held that the filing of a transcript imports more than the mere reception of it into the custody of the clerk; that his indorsement of it is necessary. In Foster's Fed. Prac., 2nd ed., 598, it is said: "No paper is considered filed unless it has the proper indorsement by the clerk." This, however, is said in treating of the subject of "costs at law and in equity." And so was the Court speaking of fees proper to be allowed, in the case of *Amy v. Shelby Co.*, 1 Fed. Cas. 817, when it said: "No paper is filed unless it has the proper indorsement of the clerk; merely placing it in the court papers is no filing."

It may be, as already observed, that the indorsement of the clerk may not, in all cases, be essential to constitute a "filing." The writ of error, however, is the writ of the appellate court, and must be sent up with the record to this court. It does not remain in the lower court and

itself become a part of the files of that court. Unless it is actually filed and thus becomes a part of the record of the lower court, there would remain in that court no record whatever of such a writ, and nothing to show any transfer of jurisdiction from the trial to the appellate court; and when it reaches the latter court, it would contain no evidence whatever of the fact essential to confer jurisdiction upon the appellate court.

We are of opinion that, by reason of the failure to file the writ of error in the court below, this court is without jurisdiction of the case.

Writ dismissed.

[Endorsed]: Filed Oct. 26, 1896. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

THE MUTUAL LIFE INSURANCE

COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, Executrix of the

Estate of GUY C. PHINNEY, Deceased,

No. 274.

Dissenting Opinion.

Before GILBERT and ROSS, Circuit Judge, and HAWLEY, District Judge.

GILBERT, Circuit Judge, Dissenting:

The decisions of the Supreme Court, referred to in the

opinion of the majority of the court, establish beyond question that it is the filing of the writ that removes the record from the inferior to the appellate court, but I am unable to concur in the view that it is essential to the filing of the writ that the indorsement of that fact be entered thereupon by the clerk.

At common law the file was a thread, or string, or wire upon which writs and other papers in courts were fastened and filed for safekeeping and for ready reference. To file a paper meant to place it upon the string or file where it belonged. The courts of the United States in interpreting the word "file" or "filing," have uniformly had in view the derivation of the word and its common law signification, and they have held that a paper is filed when it is delivered to the proper officer, and is by him received to be kept on file; and that it is not the clerical act of indorsing the paper, but the fact of its receipt by the proper officer or custodian and its lodgment in his office that constitutes a filing. They have held, moreover, that while the indorsement is the best evidence of the fact that a paper has been filed, proof of the filing may be otherwise made. This doctrine has been applied alike to the filing of pleadings and transcripts in courts and the filing of deeds and mortgages for record. (*Bishop v. Cook*, 13 Barb. 326; *Bettison v. Budd*, 21 Ark. 578; *Gorham v. Summers*, 25 Minn. 81; *Peterson v. Taylor*, 15 Ga. 483; *Colchen v. Ninde*, 120 Ind. 88; *Hook v. Fenner*, 18 Col. 283; *Harrison v. Clifton*, 75 Ia. 736; *Lesing v. Gilbert*, 27 S. W. 751; *Cook v. Hall*, 1 Gilman, 575; *Powers v. State*, 87 Ind. 144; *Reed v. Acton*, 120 Mass. 130.) The only cases holding otherwise are, first, those

in which the statute or rule of court requires that the indorsement be entered upon the paper by the clerk as a part of the filing; and second, cases in which question has arisen concerning the payment of the clerk's fees for filing, and his right to recover the same has been made to depend upon whether or not he had discharged all of his official duty by making the proper indorsement upon the papers filed by him. Of the first class is the case of *Pinders v. Yager*, 29 Ia. 468. Under the rule of the Circuit Courts of Iowa the clerk could refuse to file a transcript on appeal from a justice's court unless his fee was paid or secured. It was held that on his refusal to file for nonpayment of his fees the transcript did not become a record of the court. In a recent decision of the Supreme Court of that State, *Harrison v. Clifton*, *supra*, a case which arose after the abrogation of the rule above referred to, it was held, under section 3584 of the Code, providing that "upon the return of the justice being filed in the office of the clerk the cause shall be deemed in the Circuit Court," that the deposit of the transcript was a sufficient filing. Of the second class is the case of *Amy v. Cherokee County*, 1 Federal Cases, 817, which was a contention concerning the proper fees to be allowed to the clerk, the decision of which I submit is not pertinent to any question presented in this case. Nor do I deem it an important consideration, in determining what is the effect of simply lodging a writ of error with the clerk of the court below, that unless the writ of error has been indorsed as filed, and an entry thereof made in the docket or the fee-book of the clerk of the lower court, no evidence exists in that court after the writ has been returned to indicate the fact that the writ has been sued

out. The writ is lodged with the clerk for the purpose of removing the case from the jurisdiction of the lower court. He makes his return to the writ and sends the original thereof to this Court, together with his transcript. If, after indorsing upon such writ the fact that it was filed, the clerk should neglect to make an entry to that effect in his docket or fee-book, the jurisdiction of this court would certainly not be affected by such omission, notwithstanding the fact that nothing remained on record in the lower court to indicate that its jurisdiction over the cause had ceased. The appeal could not be dismissed by this court upon the ground that the lower court had before it no record to indicate the fact of the filing of the writ. That fact could, undoubtedly, be proven aliunde, if necessary. The return of the writ to this court in the case before us is evidence to us that it has been filed in the court below. Further evidence is afforded in the affidavit of the clerk which has been filed in this court, showing that the original writ was delivered to and lodged and filed with the clerk on the date which it bears. This, in my opinion, constitutes sufficient proof of the fact of the filing of the writ in the court below, and gives this court jurisdiction to entertain the same.

[Endorsed]: Dissenting Opinion. Filed Oct. 26, 1896.
F. D. Monckton, Clerk.

*United States Circuit Court of Appeals, for the Ninth
Circuit.*

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

VS.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of
Guy C. Phinney, Deceased,

No. 274.

Judgment.

In Error to the Circuit Court of the United States for
the District of Washington, Northern Division.

This cause came on to be heard on the transcript of the
record from the Circuit Court of the United States for the
District of Washington, Northern Division, and was ar-
gued by counsel.

On consideration whereof, it is now here ordered and
adjudged by this Court, that the writ of error of the said
plaintiff in error in this cause be, and the same is hereby,
dismissed.

[Endorsed]: Judgment. Filed Oct. 26, 1896. F. D.
Monckton, Clerk.

At a stated term, to-wit, the October term, A. D. 1896, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Friday, the thirtieth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable ERSKINE M. ROSS, Circuit Judge.

Honorable THOMAS P. HAWLEY, District Judge.

Honorable WILLIAM W. MORROW, District Judge.

MUTUAL LIFE INSURANCE COM-
PANY OF NEW YORK,

vs.

NELLIE PHINNEY, Executrix, etc.

No. 274.

Certified Copy of Order.

Upon motion of Sydney M. Van Wyck, Jr., Esquire, on behalf of plaintiff in error, good cause therefor appearing, it is ordered that the issuance of the mandate herein to the court below be, and the same is hereby, stayed twenty-five days in addition to the time allowed by the rules of this court, plaintiff in error to have leave to file petition for rehearing within that time.

*In the United States Circuit Court of Appeals in and for
the Ninth Circuit.*

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, as Executrix of
the Last Will and Testament of
GUY C. PHINNEY, Deceased.

Defendant in Error.

No. 274.

In Error to the Circuit Court of the United States for the
District of Washington, Northern Division.

Petition for Rehearing.

To the Honorable Judges of said Court:

In conformity to the rule of this court permitting an application for a rehearing of a cause determined by the court, we wish most earnestly to press upon the attention of the court a few reasons why a rehearing should be granted in this case. We approach this application with the conviction that the court is reluctant to debar a litigant from a hearing of his cause upon its merits, if, consistently with a fair construction of the statutes relating to appeals, it can grant a rehearing. The doors of the court are closed against us, because it has been held by a majority of the judges that the writ of error was not filed in the Circuit Court, and therefore the cause was never removed from that court to this. In

reaching this conclusion, we cannot held thinking certain matters in the record were overlooked. That a writ of error in the case, properly signed, sealed and allowed, issuing out of this court, was lodged with the clerk of the Circuit Court is conceded in both the majority and minority opinions. The transcript of this original writ as returned is found at page 402 of the printed record. That the clerk of the Circuit Court received the writ officially, and obeyed its mandate in conformity with the rules of this court providing for his return of the record, is made clearly manifest by his return to this writ found at page 400 of the record. The writ having been directed to and lodged with the clerk of the Circuit Court, and in it he being commanded to send the record and proceedings of the case into this court, together with the writ, he obeyed such mandate and has returned the original writ, together with the record and proceedings in the case, as he was commanded to do, and the same are now a part of the records of this court.

Rule 14, of the Circuit Court of Appeals, sec. 1, provides:

"The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case under his hand and the seal of the court."

While sec. 2 thereof is as follows:

"In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was ren-

ordered shall annex to and transmit with the record the original writ of error and citation, or citation issued in the cause, and a certificate under seal stating the cost of the record and by whom paid."

All of the requirements of these sections of the rule have been strictly complied with. It will be observed that both sections are entirely silent upon the subject of writing an endorsement of filing upon the writ of error. In fact, they impliedly would lead the clerk of the Circuit Court to conclude such was not his duty. The writ of error does not remain with him. His office is not its depository. He is not required to keep it but to append the transcript of the record and the proceedings in the cause to it and return it, not by transcript, but in its original form, to the appellate court from whence it came. It is made manifest by the return itself, compared with these rules, that the clerk acted in good faith and sought to do everything the law and the rules required of him, and did everything of a substantial nature. That the writ was received by him for the purposes of its functions is demonstrated in his certificate and its presence in this court. It was only transmitted to him in order that he might make a return. That he received it, that he made the return which is annexed to the writ itself, and that it was lodged with him at the instance of the plaintiff in error, whom he certifies paid him \$211.70 for the cost of preparing and certifying the transcript which he annexed to the writ, is attested under his hand and official seal. In this we have a higher certificate of the lodgment and filing of the writ with him for the purposes it was designed to subserve than could be found by his

mere endorsement upon the back of the paper, because we have such certificate authenticated with the seal and his official obedience to all of its commands. Nothing is lacking in substance. It is the mere formula or evidence of what has already been demonstrated. Rule 14 itself would seem to dispense with the endorsement of filing. It is specific as to just what the clerk shall do. It is no place in the rule stated that he shall put his endorsement upon it, but it is stated that when the writ is directed to him he shall "make a return of the same" by transmitting a true copy of the record, etc., under his hand and the seal of the court, and annexing to and returning with the record the original writ and citation, and a certificate stating the cost of the record and by whom paid. There seems almost implied in this rule a prohibition against placing his file mark upon it, because that usually pertains to papers which are permanently lodged in his office, whereas in this case the mandate is not to retain it but to return it to the tribunal from whence it came.

We respectfully contend that the word "filing" in the opinions of the Federal courts is not used in its narrow, literal or mechanical sense, but in a broader sense, which is made plain by the statutes and the rules, viz., a reception of the writ for the purpose of making a return to it and transmitting it to this court. It is in the broader meaning, in the sense of handing the writ to the clerk to enable him to comply with its mandate, just as as process is given to the sheriff for execution and return, that the word "filed" is employed. The idea of filing in the narrow and literal sense is foreign to the function the clerk performs. Then why, having done everything the law contemplates in obedience to the mandate of the

process, in furnishing the record and transcript by the custodian having charge of the same, should the jurisdiction of this court perish or fail to come into being, because the mere label on the back of the paper was omitted, when a higher and more substantial proof of all that such evidence could furnish is given to the court?

But, again, we call the court's attention to the original citation at page 404 of the record, signed by Judge Hanford, sitting as United States Judge, which cites and admonishes the defendant in error to appear in this court "pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the District of Washington, Northern Division, in that certain action wherein the Mutual Life Insurance Company of New York is plaintiff in error, and you are defendant in error." Such a certificate of the presiding judge that the writ of error was filed in the office of the clerk should be conclusive. The clerk is but the hand of the court, and the certificate of the judge that the writ was filed should overcome an error on the part of the clerk and much more supply his omission. This certificate of the judge is furnished on the 14th day of December, 1895, the day upon which the writ of error, signed by the same judge, bears date, and the citation in which the judge certifies to the filing of the original writ is upon the same day served upon counsel of the defendant in error, who make acknowledgment of the same: "Service of the within citation and receipt of a copy thereof admitted this 14th day of December, 1895, S. Warburton, A. F. Burleigh, attorneys and counsel for Nellie Phinney, as Executrix of the last will and testament of Guy C. Phinney, deceased."

The rule of law is clearly stated in the majority and minority opinions in this case that a writ of error is not brought until filed with the court to which it is addressed and whose record is to be removed thereby. This rule was first authoritatively and forcibly stated in the case of *Brooks v. Norris*, 11 Howard (U. S.), *p. 207, where the court says:

The act of 1789, c. 20, sec. 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question."

The section of the Judiciary Act referred to (1 Stats. at Large, p. 84), as well as the same statute incorporated in the Revised Statutes of the United States, in secs. 997, 998, 999, 1000, 1007 and 1008 are no less conspicuous than Rule 14 of this court in omitting the word "file" or the term "filing" from every provision of the statute that relates to writs of error. The language of the original Judiciary Act, sec. 22, is that "decrees and judgments" may be re-examined and reversed or affirmed "upon a writ of error, whereto shall be annexed and returned therewith at the time and place therein mentioned, an authenticated transcript of the record, an assignment of errors,

and prayer for reversal, with a citation to the adverse party, signed by the judge," etc. And later along in the same section, "And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of."

Sec. 1008 of the Revised Statutes contains the same limitation as follows:

"No judgment, decree, or order of a circuit or district court in any civil action, at law or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order."

The court must look outside of both the language of the statutes and the rule to find the word "file" or the term "filing" or any similar expression. We respectfully submit that a technical filing in the narrow sense of that term at no time entered into the contemplation of the writers of the opinions of the Supreme Court where they held that a writ of error was not sued out until filed in the office of the clerk of the trial court. What they were seeking to do was to determine a time from which the control of the trial court ceased, and from which the period of limitation on appeal or writ of error began to run. They properly held that neither the act of issuing the writ from the higher court, nor the attestation upon the writ, fixed this time, but that placing the writ in the hand of the proper officer for obeying its command determined, viz., the filing or lodging of the writ of error with the officer whose duty it was to obey its mandate.

That such is the meaning of the statute, and such must have been the meaning of the court, is made manifest by sec. 1007 of the Revised Statutes relating to supersedeas. That section provides that, "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards with the permission of a justice or judge of the appellate court."

What is expressed by the word "lodge" in this section, we contend is exactly what is meant in the opinions of the Federal courts. The writ of error is simply lodged with the clerk for the purpose of making a return by him upon it. It is in his custody transiently and temporarily. It is with him for the purpose of being surrendered up or returned to the appellate court, just as the copy of the writ is lodged with him to be given to the defendant in error. Such lodging of the writ with the clerk of the Court is doing all it is possible for the party appealing to do to make his right complete. If this were not true, a delay on the part of the clerk might rob the appellate court of its jurisdiction, or an honest misconception—as in this case—have the same effect; or a deception or falsehood upon the part of the clerk might be attended with like consequences.

This meaning of the term "file" is illustrated in *Ex parte Ralston*, 119 U. S. 613, where it is held that the clerk below is not required to furnish a transcript until a writ of error is issued to which it may be attached, Chief Justice Waite saying:

"Certainly it has been the prevailing custom from the beginning for the clerk of this court, or the clerk of the Circuit Court for the proper district, to issue the writ, and for such a writ to be lodged with the clerk of the state court before he could be called on to make the necessary transcript for use in this court." (P. 615.)

Were no further proof furnished of the filing of the writ than the supersedeas bond (See Record, pages 392, 393, 394), approved by the presiding judge, that should be sufficient. It will be observed that sec. 1007 of the Revised Statutes provides that where a writ of error may be a supersedeas, such supersedeas may be obtained by serving the writ of error, by "lodging" a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, etc. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law as aforesaid within sixty days after the rendition of such judgment, or afterwards with the permission of a justice or judge of the appellate court.

It will be seen by page 394 of the printed record that such supersedeas bond was given on the day the writ of error was issued; upon the same day a copy of it was lodged in the clerk's office pursuant to sec. 1007; and that the same judge who upon that day signed the cita-

tion, reciting that a writ of error had been filed in the clerk's office, approved the supersedeas bond, which could only in the orderly and proper course be done after the filing of the writ of error and the lodging of a copy with the clerk for the defendant in error. The above acts, as conclusive of the filing of the writ of error, as we think we have demonstrated them to be, are supplemented by the affidavit of the clerk and by the affidavit of counsel on file in this court, to which attention is also specifically called as showing each step in the proceeding down to the delivery of the writ of error into the hands of the clerk of the Circuit Court in his office, with the express request for its filing and obedience to its mandate upon his part, and a payment to him of the fees for the transcript and record.

If such fatal shipwreck were intended to be the consequence of a failure to indorse the evidence of filing upon the writ, we respectfully submit that some beacon light surely would have been placed in the Judiciary Act or in the language of Rule 14 of this court. To prevent such miscarriages of justice we think Sec. 32 of the Judiciary Act of 1789 (sec. 954 of the Revised Statutes of the United States), was enacted, which is as follows:

"No summons, writ, declaration, return, process, judgment, or other proceeding in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring spe-

cially sets down, together with his demurrer, as the cause thereof."

Justice Story, in 1st Gallison, at page 22, in applying this statute, says:

"By the judiciary act of 1789, c. 20, sec. 32, it is enacted, that all the courts of the United States, may, at any time, permit either of the parties 'to amend any defect in the process or pleadings, upon such conditions, as the said courts respectively shall, in their discretion, and by their rules, prescribe.' The language of this section is sufficiently comprehensive to sustain the application for amendments in any cases before the court; but it has been attempted to be restricted to causes of original, and not to be extended to causes of appellate jurisdiction. But we find no such distinction in the statute; and even in appellate courts, proceeding according to the course of the common law, defects apparent upon the record may be amended, when they come within the general purview of statutes." (1st Gallison Rep. pp. 22, 23.)

In *Warren v. Moody*, 9 Fed. 673, Pardee, C. J., in construing this statute says:

It (the case) came up for hearing at last term, when an amendment of substance was allowed to the original bill, and the cause continued to allow the defendant to meet the amended bill by motion to strike out or answer or plead, as counsel might advise. The defendant moves to strike out the amendment, and this motion presents the question whether it is allowable on appeal in equity to permit amendments to pleadings."

In *Kennedy v. Georgia State Bank*, 8 How. 610, it is said:

"There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the judiciary act of 1789, (now Rev. Stats., sec. 954,) allowing amendments, is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction."

"And then the court cites *Anon.*, 1 Gall. 22, in which case Justice Story, in a forcible arguments, holds that amendments may be allowed in appellate courts."

It is apparent from these decisions that this statute applies to writs from this court as much as to those of the courts of original jurisdiction, and it will be seen that Congress has declared that no writ, process, or return shall be abated, arrested, or quashed for any defect or want of form, and that the court shall regard the substance of the matter. Therefore, in this case, the judge of the court below in his citation having afforded a certificate that the writ was filed in that court, the clerk of the court having demonstrated the correctness of the judge's certificate that the writ was filed by returning it in all respects as required by the mandate of this court, and having furnished the additional proof that it was filed by production the copy of the original writ lodged with him for the defendant in error, and both clerk and judge having added to this conclusive weight of evidence the further fact that the supersedeas bond was timely filed and judicially approved, if anything could still be wanting it is certainly not a matter of substance

but just such a defect or omission as the Statute of Jeofails just quoted was intended to cover.

We desire briefly to call the court's attention to some of the opinions of the Supreme Court of the United States cited in the majority opinion(in order to show that in the view of the judges it was the service upon the clerk of the trial court or a lodgment with or delivery to him of the writ of error that constituted the filing. An examination of the leading case of *Brooks v. Norris*, 11 How. 207, will show that no other sense of the term "filing" was in the court's mind. The language of Chief Justice Taney is that the writ of error is not brought until it is filed in the court which rendered the judgment, not by the court.

This meaning is very fully borne out by a reference to the case of *Mussina v. Cavazos*, 6 Wallace, 355, wherein Justice Miller defines what is necessary to confer jurisdiction upon the appellate court so far as the service of the writ of error is concerned. At page 358, he says:

"When deposited (the writ of error) with the clerk of the court, to whose judge it is directed, it is served; and the transcript which the court sends here is the return to the writ, and should be accompanied by it."

Here, it will be observed, that the deposit with the clerk of the lower court perfects the service and gives jurisdiction to the appellate court.

In the case of *Brandies v. Cochrane*, 105 U. S. Rep. 262, the same idea is borne out by showing how an appeal may be perfected. No formal order granting the allow-

ance of an appeal as made, but the circuit judge approved the bond for an appeal and signed the citation. The opinion says:

"The bond was on the same day filed with the clerk and the citation served on the 18th of August. . . . The circuit judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary."

It will be observed the court in speaking of the filing of the bond does not state it was filed by the clerk but it was filed with him. In other words it was lodged with him for his official action.

So in the case of *Scarborough v. Pargoud*, 108 U. S. Rep. 567, the question was whether the writ of error was brought within two years, and in fixing the date for the computation of the limitation, the court says:

"The final decree in this case was rendered on the 13th day of July, 1878, and while the writ of error was allowed by the Chief Justice of the Supreme Court of Louisiana, and a bond approved and citation signed on the 5th day of July, 1880, the writ of error was not actually issued until the 14th, and the copy was not lodged in the clerk's office until the 16th of that month."

In this quotation the court expresses exactly what is meant by the filing with the clerk, not the act of the clerk in placing his file endorsement upon the writ, but that the copy was not lodged in the clerk's office until the 16th of that month.

Again, in the case of *Polleys v. Black River Improvement Company*, 113 U. S. Rep. 83, the court says:

"Though the writ of error in this case seems to have been issued by the clerk of the Circuit Court of the United States on the 10th day of May, 1884, and is marked by him for some reason as filed on that day, it is marked by the clerk of the court to which it is directed, viz., the Circuit Court of La Crosse County, as filed on the 29th day of that month. It is not disputed that this is the day it was filed in his office."

It will be observed it does not state this was the day it was filed by him but in the sense of the other decisions it was the day on which it was filed in his office, or, to use the language of the other decisions, "lodged" in his office.

Again, in the case of *Credit Company v. Arkansas Central Railway Company*, 128 U. S. Rep, 261, the court, after setting forth that the same rule is applicable to appeals as to writs of error, proceeds to state when an appeal is taken, as follows:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought,' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal, (where there is such a petition and allowance) the appeal bond and the citation. In *Brandies v. Cochrane*, it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was

a compliance with the law requiring the appeal to be filed in the clerk's office."

Much more in this case, the citation issued by the judge of the lower court reciting the filing of the writ, the copy of the writ delivered to the defendant in error in order to procure a supersedeas bond and the allowance and approval of the supersedeas bond by the court, followed up by the due return of the original writ into this court, show the service and filing of the writ.

In addition to the cases cited in the brief and in the minority opinion, to the effect that the deposit with the clerk for filing of the writ, accompanied by payment of his fees, as in this case, constitutes a filing, we would respectfully call the court's attention to the late case of *Wheeling Pottery Company v. Levi*, 19 Southern Reporter, 752, issued since the argument, in which it said:

"The filing (of the petition) was overlooked by the clerk. It was handed to him in his office to be filed. It was received by him, acted upon, and was to be kept on file, and it was a document of his office. Having been placed by the attorney in the hands of the filing officer in his office, to be filed, and it having been acted upon, as already stated, and the contemporaneous facts rendering it evident that all was done in the utmost good faith, and that the omission was owing to a mere inadvertence of the officer, we think that the plaintiffs complied with the law to every intent and purpose. The absence of the 'file mark,' under the circumstances, cannot operate to his prejudice. 'Filed' is the best evidence that the document is of record, but it is not always and under all circumstances the only evidence that will prove that a peti-

tion is of record, when, owing to clerical error, it is not expressly indorsed."

We also make the following quotations from opinions of courts upon the same subject:

"All the party can do in order to have his deed filed, is to take it to the office, and deliver it to the recorder. When he has done this, he cannot be charged with any default or negligence. The deed is then, in contemplation of law, filed for record." (1 Gilman (Ill.), 575, 579.)

"But where the law requires or authorizes a party to file it (a paper) it simply means that he shall place it in the official custody of the clerk. That is all that is required of him, and if the officer omits the duty of indorsing upon it the date of filing, that should not prejudice the rights of the party." (Holman v. Chevaillier, 14 Texas, 339.)

"Filing a paper, . . . means placing and leaving it among the files. The memorandum endorsed by the officer in whose custody it is placed, is merely evidence of the filing, and not filing itself." (1 Bradwell (Ill.), 145.)

"We are of opinion, that the word 'filing,' . . . does not include the endorsing and indexing . . . but that a mortgage is filed within the meaning of the statute, when it is delivered to and received and kept by the proper officer, in his office." (Gorham v. Summers, 25 Minn. 81, 86.)

"Careful practice would require that the clerk receiving the papers should indorse upon them the date of the filing; but such indorsement is not the filing, it is simply evidence of such filing. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file." (Powers v. States, 87 Ind. 144-148.)

"We think that a certificate of the clerk, entered upon the brief at the time it is filed, is the best evidence of such filing, but that it is not necessary to the act of filing. 'A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file.' (13 Vin. Abr. 211; 1 Bouv. Law Dict. 568.) The written memorandum of the clerk is but the evidence of the delivery to him of the paper intended to be filed. In its absence, other testimony may properly be admitted to show that such paper was filed." (*Peterson v. Taylor*, 15 Georgia Rep. 483; 60 Am. Dec. 706.)

We have taken some pains to present the record of the case and Rule 14 of this court, as well as the statutes, for the reason that the same have not heretofore been specifically brought to this court's attention as affecting the question of dismissal for want of jurisdiction. We confidently rely upon the propositions, viz.:

First.

That under the rules, the statutes and the opinions of the Supreme Court, a filing of the writ of error by the endorsement of the clerk upon it is not contemplated; that the writ is the process of this court, issuing from it, returnable to it; that what is contemplated by a filing of the writ with the clerk of the Circuit Court is simply a depositing or lodging or delivering of the writ into his hands for the purpose of making a return.

Second.

That if the law contemplates that the clerk of the Cir-

cuit Court should file the writ by making an endorsement of filing upon it, then it is clearly apparent he has misapprehended his duty to that extent, because it is shown by the conclusive evidence of the record, as well as the affidavits of counsel and that of the clerk himself, that he received the writ for all the purposes the law designed it to accomplish through his hands; and that when it was delivered to him for his official action he endeavored to discharge his duty in every particular in accordance with its mandate. He believed the writ to be the process of the appellate court, and not of the court of which he was the clerk, and that his duty required him to return the writ to this court for filing instead of placing his file mark upon it.

Under the authorities cited, we respectfully submit the filing was complete and established by conclusive evidence though not the most usual. Therefore, we respectfully ask, if the formal indorsement of filing should be deemed necessary, that the record may be transmitted by this court, to the circuit court, with directions or leave to the clerk of that court to indorse his filing upon the writ of error as of the day it was deposited or lodged with him, and return the same so endorsed to the clerk of this court.

Respectfully submitted,

JOHN B. ALLEN,

Attorney for Plaintiff in Error.

ROBERT SEWELL,

E. LYMAN SHORT,

STRUDWICK & PETERS,

STRATTON, LEWIS & GILMAN, and

STRUVE, ALLEN, HUGHES & McMICKEN,

Of Counsel for Plaintiff in Error.

United States of America, }
State of Washington. } ss.

I, John B. Allen, one of the solicitors in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is in my judgment well-founded, and that it is not interposed for delay.

JOHN B. ALLEN.

[Endorsed]: Petition for Rehearing. Filed Nov. 16, 1896. F. D. Monckton, Clerk.

At a stated term, to-wit, the October term, A. D. 1896, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Tuesday, the twenty-third day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

Honorable WILLIAM B. GILBERT, Circuit Judge.

Honorable THOMAS P. HAWLEY, District Judge.

THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

NELLIE PHINNEY, Executrix, etc.

No. 274.

Certified Copy of Order

It is ordered that the petition for rehearing heretofore filed herein be, and the same is hereby, denied.

It is further ordered that the mandate herein to the court below be, and the same is hereby, stayed sixty days from date.

473 United States Circuit Court of Appeals for the Ninth Circuit.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plain- tiff in Error,	} No. 274.
<i>v.</i>	
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phin- ney, Deceased, Defendant in Error.	

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing four hundred and seventy-two pages, numbered from one to four hundred and seventy-two, both inclusive—consisting of the transcript of record, motion to dismiss cause, motion to amend certificate and return of clerk of the circuit court, affidavits (2) of R. M. Hopkins, affidavit of James M. Quilter, affidavit of R. C. Strudwick, order of court assigning motion to dismiss to June 2, 1896; order of court continuing argument on motion to dismiss to June 3, 1896; transcript of register of circuit court, order of submission of cause, opinion and dissenting opinion, judgment, order of court staying mandate, petition for a rehearing of cause, and order of court denying the petition for a rehearing of cause and staying mandate sixty days from date—to be a full, true, and correct copy of the entire record in the above-entitled cause as the originals thereof remain of record in my office.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 15th day of March, 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

FRANK D. MONCKTON, *Clerk*,
By MEREDITH SAWYER, *Deputy Clerk*.

474 UNITED STATES OF AMERICA, *vs.*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error and Nellie Phinney, executrix of Guy C. Phinney, deceased, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of

appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

476 [Endorsed:] Supreme Court of the United States. No. 766. October term, 1896. The Mutual Life Insurance Co. of N. Y. *vs.* Nellie Phinney, executrix, &c. Writ of certiorari. Filed May 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

477 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY, Petitioner and	} No. 274.
Plaintiff in Error,	
<i>vs.</i>	
NELLIE PHINNEY, Executrix of the Estate of Guy C. Phin-	}
ney, Deceased.	

Stipulation as to Return to the Writ of Certiorari.

It is, this 20th day of April, A. D. 1897, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause submitted to the Supreme Court of the United States on the 12th day of April, 1897, with the petition for a writ of certiorari may be filed in the said Supreme Court, and may be received and considered by that court as and for the transcript of the record in said cause, as though the same had been returned by the clerk of the circuit court of appeals for the ninth circuit in obedience to the writ of certiorari granted April 19, 1897.

EDWARD LYMAN SHORT,

Attorneys for Petitioner and Plaintiff in Error.

S. WARBURTON,

Attorneys for Respondent and Defendant in Error.

(Endorsed:) Stipulation as to return to writ of certiorari issued by the Supreme Court of the United States. Filed May 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

478 I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of a stipulation entered into between the respective counsel filed in the cause entitled The Mutual Life Insurance Company of New York, plaintiff in error, *v.* Nellie Phinney, executrix of Guy C. Phinney, deceased, defendant in error, No. 274, as the original thereof remains of record in my office.

Attest my hand and seal of said circuit court of appeals this 4th day of May, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

479 United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	}	No. 274.
Plaintiff in Error,		
<i>v.</i>		
NELLIE PHINNEY, Executrix of Guy C. Phinney, Deceased,		
Defendant in Error.		

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the cause wherein The Mutual Life Insurance Company of New York is plaintiff in error and Nellie Phinney, executrix of Guy C. Phinney, deceased, is defendant in error, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 20th day of April, A. D. 1897, the original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States circuit court of appeals for the ninth circuit, at the city of San Francisco, in the State of California, this 4th day of May, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk of the U. S. Circuit Court of Appeals
for the Ninth Circuit.*

480 [Endorsed:] Case No. 16,545. Supreme Court U. S., October term, 1897. Term No., 342. The Mutual Life Insurance Company of New York, petitioner, *vs.* Nellie Phinney, executrix, &c. Writ of certiorari and return. Office Supreme Court U. S. Filed May 17, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,545. U. S. C. C. of appeals, 9th circuit. Term No., 342. The Mutual Life Insurance Company of New York, petitioner, *vs.* Nellie Phinney, executrix of Guy C. Phinney, deceased. Filed March 31, 1897.